81-2136

No. .....

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TEXACO INC.,

Petitioner,

v.

RICKY HASBROUCK, d/b/a Rick's Texaco, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 17, 1982

Questions Presented

1. Where a later Supreme Court decision conflicts with a legal theory previously adopted by a Court of Appeals, is the District Court compelled to apply the discredited doctrine of its Court of Appeals or may it attempt to correctly read and apply the Supreme Court decision?

2. After a trial in which plaintiffs chose to present their case solely on the basis of the earlier Court of Appeals theory, deliberately declining to also introduce evidence to meet the Supreme Court's standard, must the District Court impose upon the defendant, court and public the costs and burdens entailed in giving the plaintiffs another opportunity to re-try their case in accordance with the very Supreme Court legal standard plaintiffs previously chose to disregard or may it finally terminate the litigation for conceded failure of proof?

3. Does the Ninth Circuit's decision below

(i) requiring its district courts to decline to apply subsequent Supreme Court reasoning unless it "necessarily" and explicitly (rather than *"sub silentio"*) overrules the Ninth Circuit's earlier decisions, and

(ii) holding it an "abuse of discretion" not to give a second trial to plaintiffs who deliberately chose at the

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Pursuant to Rules 21.1(b) and 28.1 of this Court, Petitioner Texaco states that it has no parent and that its subsidiaries and affiliates are listed in the Appendix (App. 58a).

The plaintiffs below were: Ricky Hasbrouck; James O. Sills; Alva N. Blue; John W. Bevan; Ricky A. Rigg; Clifford N. Robinson; Gene C. Robinson; Albert E. Allen; Harold C. Hardwick; Henry Rigg; Vincent Lies; and Ralph O. Webber.

first trial not to introduce evidence to meet the governing Supreme Court standard that was fully brought to their attention before trial,

warrant exercise of this Court's power of supervision?

4. Whether, in light of this Court's pending review in *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 654 F.2d 1224 (7th Cir. 1981), *cert. granted*, 102 S. Ct. 1610 (Mar. 1, 1982) (No. 81-1271), of the issue of adequate proof of competitive injury for purposes of a private Robinson-Patman action, the determination of which may be dispositive of this proceeding, this matter should be held pending such determination by this Court.

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IN THE

Supreme Court of the United States

October Term, 1981

No. .....

TEXACO INC.,

Petitioner,

v.

RICKY HASBROUCK, d/b/a Rick's Texaco, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Texaco Inc. respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered on December 14, 1981, as to which a timely petition for rehearing was denied on February 16, 1982.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, *Hasbrouck* v. *Texaco Inc.* (App. 1a),[1] is reported at 663 F.2d 930. The opinion of the United States District Court for the Eastern District of Washington,

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[1] The citation "App....." refers to the appendix to this petition. Trial transcript passages are cited as "Tr....". Trial exhibits are cited as "Ex....".

Hasbrouck v. *Texaco Inc.* (App. 9a), is reported at 1980-2 Trade Cas. (CCH) ¶ 63,343.

Jurisdiction

The judgment of the Court of Appeals was entered on December 14, 1981, with a timely petition for rehearing being denied on February 16, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth in the Appendix (App. 56a).

Statement of the Case

This case, it is respectfully submitted, disgraces the federal courts. It adds substance to the public dissatisfaction with the over-expensive, enormously disruptive and seemingly endless and pointless process of justice.

How does a lawyer explain to his or her client that although the Supreme Court has now emphatically reconfirmed the validity of the lawyer's advice that a prior decision of this Court required each plaintiff to prove actual injury in every antitrust treble-damage suit (which plaintiffs intentionally declined to attempt to prove during a four-week trial despite defendant's efforts to get them to try to do so), nevertheless the client is to be subjected anew to more years of the same litigation?

Perhaps more importantly, how are district court judges to understand their role if they cannot correctly apply the decisions of this Court to the cases pending before them? What are they to make of a decision where a District

Judge's reading of a Supreme Court opinion is fully endorsed by a subsequent Supreme Court case but he is told by his Court of Appeals it was an abuse of discretion for him to so read it?

Statement of Facts

This is an antitrust treble-damage action under § 4 of the Clayton Act[2] by twelve Texaco brand gasoline retailers in Spokane, Washington, claiming Texaco violated § 2(a) of the Robinson-Patman Act as to each of them by selling gasoline in Spokane (1) to a large "unbranded" distributor, Gull Oil Company ("Gull"), that did not resell it as "Texaco" gasoline but rather through its own "Gull" marketing network and to other distributors and independent unbranded service stations; and (2) to a wholesale distributor of Texaco brand gasoline in Spokane, John Dompier Oil Company ("Dompier"). Plaintiffs' theory was that they should not have been charged any more than the independent distributor Gull and the wholesaler Dompier because these "favored" customers sometimes resold to their customers in Spokane below the price Texaco charged plaintiffs and sometimes also sold through stations they owned.

For present purposes, it is unnecessary to burden the Court with the details of the various defects in this theory (including the notion that distributors, wholesalers and retailers should be charged the same price, and the absence of any adverse competitive effects), the matter of damages, respectfully, being dispositive.

Plaintiffs chose not to introduce evidence that would enable the jury to determine to what extent, if any, one or another plaintiff was proximately injured by any transaction purportedly violative of the antitrust laws. Instead,

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[2] Jurisdiction was based on 15 U.S.C. § 15 and 28 U.S.C. § 1337.

they submitted to the jury as their only claim for damages calculations that took each plaintiff's gasoline purchases for the entire period for which damages were claimed (January 30, 1972 to June 30, 1979) and multiplied them by the difference between his buying prices and those of (a) the branded wholesaler and (b) the unbranded distributor (which were below the wholesaler's) (Ex. 526). The jury awarded each plaintiff the precise arithmetical average of the two, thereby giving each retailer a retroactive price reduction that, even before trebling, would place his price per gallon well below the wholesaler's.

"Damages" were thus entirely unrelated to where and with whom any plaintiff competed, what nearby Dompier or Gull stations paid or charged, what prices were charged by other closer gasoline stations in Spokane (there were almost 200 stations unrelated to Texaco), and what was happening with respect to each plaintiff's own volumes, prices and profits. No distinction was made even for those plaintiffs who testified that, during the so-called damage period, they sold all of the Texaco gasoline they could get at the maximum mark-up allowed them under federal energy regulations (*see* App. 52a-53a). The more gasoline any plaintiff sold, the more profits he made, the more "damages" he was entitled to—and awarded—under plaintiffs' theory of "automatic damages."

Proceedings Below

From discovery through the end of trial (the latter consuming four weeks in August, 1979), Texaco repeatedly urged[3] that plaintiffs could not rely upon the "automatic

[3] *E.g.*, the contentions in this paragraph with respect to *Fowler* and *Brunswick* were made in Texaco's "Memorandum in Support of Motion to Compel Further Answers to Interrogatories or, in the Alternative, to Preclude", p. 20 (March 19, 1979).

damage" approach of *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), both (a) because *Fowler* could no longer be considered a viable precedent in light of this Court's holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that actual injury stemming from the antitrust violation is required to sustain a private antitrust cause of action and (b) because the factual situation was so different from *Fowler* (where everybody but the plaintiff was favored) as to make application of its "automatic damage" approach here (where an opposite situation existed) simply absurd.[4]

Plaintiffs, however, chose to stand or fall on their theory of "automatic damages." When defendant moved for a directed verdict for failure of proof of injury and damage, plaintiffs urged that because of the time already spent on trial, the Court should submit the case to the jury on plaintiffs' damage theory and then, if it believed the theory unsound, grant judgment n.o.v. (Tr. 2615-16). The District Court adopted this course.[5]

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[4] As the District Court observed,

"*Assuming that only one Dompier or Gull supplied competitor of plaintiffs purchased gas for a lower price and sold it at a lower price than the plaintiffs*, under the automatic damage theory, it is presumed that all plaintiffs, even though operating in different areas of Spokane, have directly suffered a loss equal to the cents per gallon discrimination multiplied by the number of gallons each purchased. *Such an award bears no relationship to actual injury* and illustrates the possibility of an absurd result if *Fowler* is applied in a multiplaintiff suit" (App. 45a-46a; emphasis added).

[5] The District Court observed in its April 28, 1980 Order Amending Memorandum Decision Filed March 31, 1980 (App. 54a-55a):

"Texaco maintained that with regard to the question of the measure of damages that the *Fowler* case was not the law of the Ninth Circuit and should not be followed, but if it were followed in this case, the jury should be instructed that it is the only measure of damages which would be permitted since

In its exhaustive opinion, the District Court first observed the procedural circumstances underlying its decision:

> "Since damages were not proved, neither the fact of damage nor the amount of damage, the Court should have granted defendant's motion for a directed verdict, and having failed to do so, now grants the motion for judgment notwithstanding the verdict" (App. 12a).

It concluded:

> "It is the opinion of this Court that the theory of automatic damages set forth in *Fowler* is not the rule of law in the Ninth Circuit, and even if it were still considered viable, automatic damages are inapposite given the set of facts in this case and therefore *Fowler* is not controlling" (App. 17a).

It recognized what courts around the country were recognizing—that in light of the Court's decision in *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969), and *Brunswick*, *Fowler* was no longer viable.[6]

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there was no proof of any other damages sufficient to sustain a jury verdict. *Plaintiffs' counsel acknowledged and the Court was of the opinion that plaintiffs' proof would not sustain a finding of damages on any other theory* than the *Fowler* decision. Therefore, the Court was of the opinion that if the jury found that damages should be awarded that it had to compute damages based upon the *Fowler* decision and so instructed the jury. The Court was also of the opinion that if the *Fowler* case was not to be followed, that the defendant was entitled to a directed verdict at the end of plaintiffs' case *because there were no damages sufficiently proven to sustain a jury verdict*" (emphasis added).

[6] The District Court's reading of *Brunswick* was eminently accurate:

> "It is the opinion of this Court and others that the *Brunswick* analysis is relevant and controlling on the issue of auto-

It also carefully explained why "automatic damages" were inapposite in the *Hasbrouck* context:

> "The present case is a classic example of why the rule of automatic damages is inappropriate for failure to require proof of causation. In this case, injury may have been caused by other nonantitrust factors such as the trend of the motoring public to purchase from self-service stations rather than the traditional full-service name brand station, economic factors, fuel shortage, independent pricing policies of retailers

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matic damages in a price discrimination suit. The plaintiffs in both the present action and *Brunswick* seek treble damage recovery pursuant to Section 4. *Brunswick* is not just a merger case under the Sherman Act but is the premier case defining injury for purposes of sustaining a private right of action under Section 4. That in itself is sufficient for *Brunswick* to be relevant. Also, there is no reason why a plaintiff seeking treble damages based on a Section 7 violation should be subject to Section 4 requirements while a plaintiff seeking treble damages under Section 2(a) is not, unless Congress clearly mandates such intent. This Court finds no such expression in either the language or the legislative history of Section 2(a), Section 7 or Section 4. *Brunswick* is particularly relevant to the present situation because both Section 7 and Section 2(a) require the same anticompetitive effect, i.e., may substantially lessen competition or tend to create a monopoly, attributable to defendant's illegal conduct which results in a compensable antitrust violation and injury. The difference in the two sections is the proscribed conduct—Section 7 proscribing illegal mergers and Section 2(a) proscribing illegal price discrimination. Clearly, Justice Marshall's analysis in *Brunswick* is applicable to price discrimination actions and that analysis militates against recovery of automatic damages. Thus, as the plaintiffs in *Brunswick* were required to prove more than the possibility that injury may result, so must the plaintiffs here prove more than the possibility of injury to recover under Section 4. Similarly in a price discrimination case, it is not the price differential itself which makes the defendant's conduct unlawful, just as it is not the merger itself which violates Section 7; rather it is the results of the illegal discrimination, the anticompetitive effects, which cause injury to the plaintiff that creates a cause of action" (App. 26a-27a).

that were supplied by Gull and Dompier, nonfavored competitors and plaintiffs' individual problems. There is a real possibility that the plaintiffs in this case just as in *Brunswick*, may have been in the same identical position but with no compensable injury even without the price discrimination" (App. 29a).

• • •

"The plaintiffs in this case relied on *Fowler* and did not attempt to prove causation. But *Fowler* did not confront the question of causation since there, unlike here, causation was not an issue. . . . [T]heir case on causation is legally insufficient" (App. 50a).

• • •

"The presumption that the price discrimination is the cause of injury where the facts disclose several causative possibilities would allow grossly inaccurate damages resulting in great injustice to Texaco and other defendants in cases of this nature" (App. 50a-51a).

In all the foregoing, there is no disputing that the District Court correctly stated and applied the governing legal principles.

This was underscored by this Court's subsequent decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981):

"Our decision here is virtually governed by our reasoning in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). There we rejected the contention that the mere violation of § 7 of the Clayton Act, which prohibits mergers which *may* substantially lessen competition, gives rise to a damage claim under § 4. We explained that "to recover damages [under § 4] respondents must prove more than that the peti-

tioner violated § 7, since such proof established only that injury may result." *Id.*, at 486. Likewise in this case, proof of a violation does not mean that a disfavored purchaser has been actually "injured" within the meaning of § 4."

The Ninth Circuit, however, far from commending the District Court for accurately analyzing and following *Brunswick*'s reasoning, castigates it for doing so. Whatever this Court may have said about *Brunswick* in *Truett Payne*, the Ninth Circuit refuses to find that *Brunswick* "necessarily overruled *sub silentio Fowler*" (App. 4a). It also declines to find that "*Fowler* was clearly distinguishable" (App. 4a). District courts in the Ninth Circuit are now to be restricted in deferring to the reasoning of this Court. For having correctly perceived this Court's reasoning, the District Court was guilty of "an abuse of discretion" (App. 4a).

Treating *Truett Payne* as though it announced a revolutionary new doctrine not foreshadowed by any precedent and beyond reasonable anticipation,[7] the Court of Appeals rewards the plaintiffs' tactical decision to forego attempting to prove causation and actual injury at the first trial with the opportunity to subject defendant and the District Court to a second trial.

Reasons for Granting the Writ

1. The Ninth Circuit's effort to inhibit district courts from reading and analyzing this Court's decisions for their reasoning, and the developments they may foreshadow, is

[7] For a discussion of the factors which a court must consider in determining whether a decision which changes the law is to be applied nonretroactively, see *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971).

at war with its own precedents,[8] with the oath and proper functioning of district judges and, respectfully, with common sense. If not promptly reversed by this Court, its potential for mischief is incalculable.

The decision of the Court of Appeals rejects the basic proposition that a district court, like all inferior federal courts, must apply the latest rules of law formulated by the Supreme Court to all cases coming before it. The District Court's conclusion was—to repeat—that

> "the *Brunswick* analysis is relevant and controlling on the issue of automatic damages in a price discrimina- the suit" (App. 26a).

In *Truett Payne*, this Court reached the *identical* conclusion:

> "Our decision here is virtually governed by our reasoning in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)." 451 U.S. at 562.

Indeed, the District Court used the same reasoning that this Court did in *Truett Payne* in concluding that *Brunswick* controls.

By ruling that *Fowler*—not *Brunswick*—was governing at the date of trial in 1979, the Court of Appeals flouts this Court's explicit confirmation in *Truett Payne* that *Brunswick*'s reasoning was governing. The Court of Appeals' ruling is thus contrary to the previously unquestioned law that a Court of Appeals is required to follow the reasoning of Supreme Court decisions, not just their results. Obviously, it is impossible for this Court to spell out all the implications and consequences of its decisions.

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[8] *E.g.*, *Wasserman* v. *Municipal Court*, 543 F.2d 723, 724-25 (9th Cir. 1976).

It must rely on the lower federal courts to follow and interpret those decisions.

The decision of the Court of Appeals wants differences in the laws of the circuits maintained unless and until the Supreme Court explicitly overrules them. The decision would thus preclude the uniformity among the circuits which has hitherto ensued following a decision of the Supreme Court. A Supreme Court decision would have a different effect in the different circuits depending on the prior case law in those circuits.

2. Plaintiffs were fully alerted before and during trial to the litigation risks they were taking by refusing to offer proof of actual damages. They might have avoided those risks by proceeding simultaneously and alternatively with both approaches of actual damages and automatic damages. They elected not to do so and to rely entirely upon automatic damages. The salutary principles underlying the rule against splitting causes of action, 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.410[2] (1982), and the doctrines of *res judicata* and collateral estoppel, not to mention the due process rights of the defendant, dictate that parties not lightly be rewarded with opportunities to start all over again. The principles recently referred to by this Court in another context, it is respectfully submitted, are particularly apposite:

> "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. . . . The Court of Appeals' reliance on 'public policy' is similarly misplaced. This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters

once tried shall be considered *forever* settled as between the parties.' [citation omitted, emphasis added] We have stressed that '[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . .' *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). The language used by this Court half a century ago is even more compelling in view of today's crowded dockets:

> 'The predicament in which respondent finds himself is of his own making . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.' *Reed* v. *Allen*, 286 U.S., at 198-199."

Federated Dep't Stores Inc. v. *Moitie*, 452 U.S. 394 (1981).

As the concurring opinion in *Moitie* observes, the strict application of these principles "is a special need . . . in complex multiple party actions of this sort so as to discourage 'breakaway' litigation." 452 U.S. at 403.

3. This Court in *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, No. 81-1271 (*cert. granted*, 102 S. Ct. 1610 (Mar. 1, 1982)) has agreed to consider the question of

"Whether the court of appeals erred in applying the competitive injury test of *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), where there was no evidence either of seller predation or of systematic preference to large buyers, and where the evidence showed that the plaintiff lost sales because the defendant supplier was a dying regional brewer that lost sales in all of its markets?" (Petition for a Writ of Certiorari, at i)

This case also presents the inappropriateness of inferring competitive injury under the *Morton Salt* doctrine in light of district court findings making such an inference irrational. For example, the *Vanco* petitioner questioned the applicability of the *Morton Salt* doctrine when there are other causal factors present, urging that the record there showed that "wholesale and retail pricing decisions entirely beyond [the defendant's] control . . . played a pivotal role in determining relative retail prices . . ." (Petition at 15). Here, pricing decisions by the "favored" customers and their customers and by numerous other competitors also played a pivotal role in determining prices. The District Court found that "[t]his case is further complicated by the presence of principal competitors of the plaintiffs who were not favored customers of Texaco, many of which sold at a lower retail price than the plaintiffs" (App. 46a). The other findings as to competitive effects by the District Court would also preclude application of *Morton Salt* (*see* App. 29a, 44a-48a).

For these reasons, the Court should hold this case for further consideration pending clarification of the *Morton Salt* doctrine in the *Vanco* case.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-3160.

Argued and Submitted Sept. 10, 1981.

Decided Dec. 14, 1981.

Ricky HASBROUCK, d/b/a Rick's Texaco; James O. Sills, d/b/a Jim's Springhill Texaco Service; Alva N. Blue, d/b/a Blue's Texaco; John W. Bevan, d/b/a Bevan's Texaco and Towing and Bevan's Northwood Texaco; Ricky A. Rigg, d/b/a Five Mile Texaco; Clifford N. Robinson, d/b/a Robinson's Freeway Texaco; Gene C. Robinson, d/b/a Hillyard Texaco; Albert E. Allen, d/b/a Van's Texaco; Harold C. Hardwick, d/b/a Harold's Texaco Service & Towing; Henry Rigg, d/b/a Hank's Texaco; Vincent Lies, d/b/a Lie's Texaco & U-Haul; Ralph O. Webber, d/b/a Webber's Auto Repair & Service Station,

Plaintiffs-Appellants,

v.

TEXACO, INC., a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Washington.

Before SNEED and CANBY, Circuit Judges, and HOFFMAN,* District Judge.

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* Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Opinion of United States Court of Appeals

SNEED, Circuit Judge:

Eleven "independent" Texaco service station operators (appellants) charged their supplier, Texaco, Inc. (appellee), with price discrimination in violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Treble damages were sought under section 4 of the Clayton Act, 15 U.S.C. § 15. The jury returned a verdict in appellants' favor. The district court, concluding that the verdict had been infected by erroneous jury instructions, granted appellee's motion for judgment notwithstanding the verdict (J.N.O.V.). We reverse and remand for a new trial. We affirm, however, as to two issues.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants' grievances arise out of appellee's gasoline pricing policy in the Spokane, Washington area during the years 1972-1979. While charging appellants uniform "Retailer Tankwagon" prices, appellee granted "distributor" discounts to two other area companies. Appellants alleged that, though nominally wholesalers, these companies increasingly became directly involved in retailing. Further, when they did not own the repurchasing outlet outright, these favored buyers allegedly passed on all or part of the original price discount to the retailer. Injury to competition in the retail market is said to have resulted from this discriminatory pricing scheme.

Appellants requested and received jury instructions on proof of damages based on *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970). *Fowler* adopted the "automatic damages" rule in price discrimination cases, whereby minimum damages equal to the product

of the illegal price differential times the quantity of plaintiff's purchases can be inferred from proof of price discrimination alone. Relying on this inference, appellants chose not to introduce sufficient evidence from which a jury could estimate actual dollar losses resulting from diminished sales or narrowed profit margins. The jury apparently applied the *Fowler* rule as instructed.

Appellee moved for J.N.O.V. or a new trial. The court accepted appellee's argument that the *Fowler* instructions were erroneous because *Fowler* either was distinguishable, had been overruled *sub silentio,* or was simply bad law. A preferred rule was found in cases requiring more rigorous proof of damages. *See, e.g., Chrysler Credit Corp.* v. *J. Truett Payne, Inc.,* 607 F.2d 1133 (5th Cir. 1979), *aff'd sub nom. J. Truett Payne Co.* v. *Chrysler Motors Corp.,* —— U.S. ——, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981). Thus, because appellants had not met this higher standard of proof and admitted the extreme difficulty of meeting such a standard should *Fowler* not control, J.N.O.V. was granted. Numerous other grounds urged by appellee were rejected and the new trial alternative was conditionally denied. Appellant timely filed this appeal.

The Supreme Court affirmed *J. Truett Payne* during the pendency of this appeal. In doing so, the Court expressly rejected *Fowler* and the automatic damages theory. 101 S.Ct. at 1926-27 & 1927 n.2. *Fowler* clearly is no longer valid law in this circuit.

II.

The Effect of the Demise of Fowler

J. Truett Payne confirms the trial court's ultimate conclusion that the *Fowler* measure of damages should not be

applied in Robinson-Patman cases. That, however, does not dictate summary affirmance of the J.N.O.V. If *Fowler* was still valid and not properly distinguishable at the time of the ruling on the J.N.O.V. motion, it should have been applied. District courts are bound by the law of their own circuit. *E.g., Bolf* v. *Berklich*, 401 F.Supp. 74, 76 (D.Minn. 1975). They are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be. *United States ex rel. Winfield* v. *Cascles*, 403 F. Supp. 956, 960 (E.D.N.Y. 1975). To the extent the district court based its J.N.O.V. on its own dissatisfaction with *Fowler*, it erred.

We do not feel that *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), or the Ninth Circuit cases relied upon by appellee, *e.g., California Computer Products, Inc.* v. *International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979); *Rutledge* v. *Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975), necessarily overruled *sub silentio Fowler*.[1] Nor do we feel that *Fowler* was clearly distinguishable. Thus, appellants' reliance on *Fowler* at the time of trial was justified. Granting J.N.O.V. in appellee's favor because of that reliance was an abuse of discretion. Further, the record does not support the contention that appellants admitted inability to prove damages under any rule but *Fowler*. Accordingly, the J.N.O.V. must fall and a new trial be ordered, this trial to conform with the analysis of *J. Truett Payne*, *supra*, 101 S.Ct. at 1926-28. This parallels the choice of the Seventh Circuit in a case nearly identical with this one.

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[1] While we are aware that the Supreme Court relied upon *Brunswick* in deciding *J. Truett Payne*, we note that the Court also resorted to legislative history to buttress its conclusion. 101 S.Ct. at 1927. Appellants cannot be penalized simply for failure to read *Brunswick* as overruling *Fowler sub silentio*.

Vanco Beverages, Inc. v. *Falls City Industries, Inc.*, 654 F.2d 1224, 1231 (7th Cir. 1981); *see also Brunswick, supra*, 429 U.S. at 483 n.6, 97 S.Ct. at 694 n.6.

III.

The Scope of the New Trial

The only question remaining is the scope of the new trial. Courts of appeal have broad discretion to grant new trials on all or only some issues. *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931); *Heckman* v. *Federal Press Co.*, 587 F.2d 612 (3d Cir. 1978); *see also United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924, 81 S.Ct. 1552, 6 L.Ed2d 384 (1961) (reversing a bifurcation order). In fashioning their orders these courts must keep in mind that the item to be retried must be "so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Products, supra*, 283 U.S. at 500, 51 S.Ct. at 515.

We find that two of the issues decided below are sufficiently "distinct and separable" from the measure of damage question that, in the interest of judicial economy, they may be presently disposed of without affecting the fairness of the contemplated new trial. The first issue involves the appellee's claim of implied antitrust immunity for its pricing policies during the period of federal mandatory gasoline price ceilings. The trial court correctly rendered partial summary judgment against this claim. *See Oahu Gas Service, Inc.* v. *Pacific Resources Inc.*, 460 F.Supp. 1359 (D. Hawaii 1978); *Inter City Oil Corp.* v. *Murphy Oil Corp.*, [1976] 1 Trade Cases (CCH) ¶ 60,948 (D.Minn. 1976); *but see Evanson* v. *Union Oil Co.*, 4 En. Mngm't (CCH) ¶ 26,158

(D.Minn. 1979). The second issue involves the jury's implicit finding that the sales in question occurred "in commerce," a jurisdictional prerequisite to a Robinson-Patman claim. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974); 15 U.S.C. § 13(a). This jurisdictional issue is normally a fact question for the jury to resolve. *E.g. Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F.Supp. 243, 272-73 n.62 (E.D.Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). Passage of title or the terms of shipment, although relevant, does not control. *S & M Materials Co.* v. *Southern Stone Co.*, 612 F.2d 198, 200 (5th Cir.), *cert. denied*, 449 U.S. 832, 101 S.Ct. 101, 66 L.Ed.2d 37 (1980). The evidence submitted by appellants, including proof of the existence of a national exchange agreement between appellee and another refiner covering the gasoline involved, justified submission of the question to the jury and supported the jury's ultimate conclusion that the jurisdictional requirement was satisfied. *Cf. Hardrives Co.* v. *East Coast Asphalt Corp.*, 329 F.2d 868 (5th Cir.), *cert. denied*, 379 U.S. 903, 85 S.Ct. 192, 13 L.Ed.2d 176 (1964) (dealing with a similar exchange agreement). Thus, since we find no error in the treatment of the immunity and interstate commerce issues below and believe that the measure of damages can be fairly calculated on remand without relitigating these collateral issues, we affirm the trial court's disposition of these two issues.

The appellants would have us affirm the jury's finding of liability and remand on the measure of damages issue alone. We do not feel, however, that the determination of liability is fairly separable from the calculation of damages in a private antitrust action such as this one. *See Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978) (noting

the overlap between proof of injury for liability purposes and for damage calculation purposes under Clayton section 4). Accordingly, we remand for a new trial on both the issues of liability and amount of damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART.

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-3160

FILED
Feb. 16, 1982

RICKY HASBROUCK, d/b/a Rick's Texaco, et al.,

Plaintiffs-Appellants,

v.

TEXACO, INC., a foreign corporation,

Defendant-Appellee.

BEFORE:

SNEED and CANBY, *Circuit Judges,*
and HOFFMAN,* *District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Order Granting Judgment Notwithstanding Verdict

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-76-27

RICKY HASBROUCK, dba RICK'S TEXACO, et al.,

Plaintiffs,

v.

TEXACO INC., a foreign corporation,

Defendant.

This matter having come on for hearing before the Court, the Honorable Marion J. Callister, District Judge, presiding, on defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, and the Court having considered the issues and rendered a decision pursuant to the memorandum decision entered herein;

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict should be, and the same is hereby, GRANTED;

IT IS FURTHER ORDERED that defendant's motion in the alternative for a new trial should be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that defendant's motion for mistrial taken under advisement at the time of trial should be, and the same is hereby, DENIED.

Order Granting Judgment Notwithstanding Verdict

IT IS FURTHER ORDERED that neither party should be awarded attorneys fees and that each should bear their own costs in this matter.

Dated this 26th day of March, 1980.

/s/ MARION J. CALLISTER
MARION J. CALLISTER
United States District Judge

Memorandum Decision of District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-76-27

RICKY HASBROUCK, dba RICK'S TEXACO, et al.,

Plaintiffs,

v.

TEXACO INC., a foreign corporation,

Defendant.

CALLISTER, District Judge.

This matter is before the Court on defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The plaintiffs in this action operated Texaco service stations and bought gasoline directly from defendant, Texaco, Inc. (hereinafter referred to as "Texaco") and resold it to the consuming public in Spokane, Washington. Simultaneously, Texaco sold gasoline at lower prices to John Dompier Oil Company, Inc. (hereinafter referred to as "Dompier") and to Gull Oil Company (hereinafter referred to as "Gull"), each of which also owned and supplied retail service stations. The plaintiffs alleged that because of their lower price, Gull and Dompier were able to sell at lower retail prices than the plaintiffs, competitively injuring plaintiffs in violation of the Robinson-Patman Act, Section 2(a), 15 U.S.C. § 13, and the Clayton Act, Section 4, 15 U.S.C. § 15. After a four-week jury trial, the twelve plaintiffs were collectively awarded a verdict in the amount of $849,484.15 and awarded judg-

ment on the verdict against the defendant, Texaco, for treble damages in the sum of $2,548,452.45. The Court now concludes that the verdict was the result of erroneous instructions allowing automatic damages based on the Ninth Circuit decision of *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (1969), *cert. denied*, 396 U.S. 1012 (1970), which should not have been followed in this case. The instructions allowed the jury to find the fact of damage if it determined price discrimination existed and required the jury to use the determined amount of price discrimination as the measure of damages. That instruction was inappropriate for the facts of this case and should not have been given. Since damages were not proved, neither the fact of damage nor the amount of damage, the Court should have granted defendant's motion for a directed verdict, and having failed to do so, now grants the motion for judgment notwithstanding the verdict.

I. STATUTES:

Robinson-Patman Act § 2, 15 U.S.C. § 13

In 1914, Congress enacted the Clayton Act. Section 2 of the Act was designed primarily to outlaw the practices of large corporations of local price-cutting for the purpose of destroying a local competitor. This unfair trade practice was invalidated because it was deemed to encourage the growth of monopoly power. The Act, intended to maintain competition, was ineffective in that it only prevented primary line discriminations. (Primary line relates to competition between the seller's competitors and the seller. Secondary-line relates to competition between the customers of the seller.) In 1936, in response to a report by the Federal Trade Commission, Congress amended Section 2 of the

> Clayton Act by enacting the Robinson-Patman Act. The amendment was designed to invalidate the injurious handicaps imposed by discriminations in disfavored customers . . . by creating a situation of competive equality between small businesses and large chain stores. It dealt with 5 types of discriminatory practices.

21 SYRACUSE L. REV. 941, 942 (Fall-Summer 1969-1970) (footnotes omitted).

Section 2(a) of the Act provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them. . . .

15 U.S.C. §13(a) (1973).

Clayton Act § 4, 15 U.S.C. 15

Section 4 of the Clayton Act provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1973).

II. Instructions to the Jury

The Court properly instructed the jury concerning the requisite elements that must be established for private recovery of a Section 2(a) violation as follows:

> In order to recover damages for price discrimination by Texaco, each plaintiff must have proved by a preponderance of the evidence the following elements:
>
> 1. That Texaco made a contemporaneous sale of gasoline to the plaintiff and John Dompier Oil Company or Gull Oil Company—that is Texaco made a sale to that plaintiff and Dompier or Gull at or about the same time;
>
> 2. That Texaco sold gasoline to Dompier Oil Company or to Gull Oil Company at a lower price than was charged to the plaintiff;
>
> 3. That the gasoline purchased by the plaintiff and his competitor was of like grade and quality—that is, of the same type (e.g., regular and regular, premium and premium);
>
> 4. That either of the sales to the plaintiff or his competitor involved in the discrimination was in interstate commerce;
>
> 5. That the effect of the discrimination produced a reasonable likelihood of substantially lessening competition or to tend to create a monopoly in the sale of

gasoline or to injure, destroy or prevent competition by each of the plaintiffs with Dompier Oil Company or Gull Oil Company or with a customer of Dompier Oil Company;

6. That at the time it was charged the lower price, the competitor of the plaintiff was in substantial competition with the plaintiff;

7. That each plaintiff was injured in his property or business by reason of such discrimination; and

8. That the injury resulted in damage to him in an amount which can be estimated and determined with reasonable probability, supported by reasonable data.

See, e.g., Rutledge v. *Electric Hose & Rubber Company*, 511 F.2d 668, 677 (9th Cir. 1975).

Concerning the element of damages, the Court further instructed the jury that:

In addition to the elements I have already discussed, in order to recover against Texaco the plaintiffs have the burden of proving that they suffered injury by reason of Texaco's violations, and the amount of their damage resulting from that injury.

A plaintiff is first required to establish with reasonable probability the existence of a causal connection between the discriminatory price or unfair business practice and some damage to him. This element of proof is called the fact of damage. The fact of damage, like any other fact, may be proved by direct evidence, or by circumstantial evidence, or both. The plaintiffs are not confined to proof of one particular kind of injury, but may prove all types of economic damage

actually resulting from the violation to establish the fact of injury.

Each plaintiff must prove the *fact* of his injury resulting from the alleged violation with reasonable certainty. The plaintiff's injury must be substantially attributable to the particular lower price (i.e., undercharge) granted by Texaco to Dompier or to Gull which he claims amount to a violation of the Robinson-Patman Act with respect to him.

Following those appropriate instructions, the Court erroneously charged the jury:

With respect to this requirement of proving the fact of damage to the plaintiff, *if you find that Texaco did unlawfully discriminate in price against the plaintiff without legal justification, you may consider that the discrimination in price may constitute business injury.* (emphasis added to illustrate erroneous parts).

• • •

If you determine that the price discrimination and injury to any plaintiff has been proved by a preponderance of the evidence in the case and that defendant has not proved its affirmative defense that such price discrimination was due to a good faith effort on its part to meet competition, by a preponderance of the evidence, it will then be your duty to return a verdict in favor of that plaintiff, assessing his damages at such sum as will reasonably and fairly compensate him.

In this case, *the plaintiffs have measured the damages which they allege they suffered as being equal to the amount of the price discrimination. I instruct you that that is the appropriate way in which damages*

should be measured in this case. Under the law, the actual amount of discrimination is the measure of a general damage award for a plaintiff; that is, you should measure the damages by taking the cents per gallon discrimination and multiplying it by the number of gallons the plaintiff purchased during the continuance of the discrimination. (emphasis added to illustrate erroneous parts).

III. AUTOMATIC DAMAGES

The rule of automatic damages, pursuant to which the Court charged the jury, was adopted from the case of *Fowler Manufacturing Company* v. *Gorlick, supra.* It is the opinion of this Court that the theory of automatic damages set forth in *Fowler* is not the rule of law in the Ninth Circuit, and even if it were still considered viable, automatic damages are inapposite given the set of facts in this case and therefore *Fowler* is not controlling.

a. *The Rule of Automatic Damages is Not The Law in the Ninth Circuit*

The rule of automatic damages permits recovery based on the amount of discrimination in price between business competitors without proof of any actual injury to business or property. The *Fowler* court held "that under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award." *Id.* at 1252. An analysis of relevant antitrust statutory and case law militates against the appropriateness of automatic damages.

The Robinson-Patman Act was enacted as an amendment to the Clayton Act in order to prevent unequal advantages being given to business competitors. 15 U.S.C. § 13 (1973), 80 Cong. Rec. 3115-3116 (1936). According to Section 4 of the Clayton Act, the basis of a damage claim under the Act was to be injury "to the business or property" of the injured party and for private recovery of a treble damage suit such injury is required. 15 U.S.C. § 15 (1973).

The *Fowler* court applied a general damage standard which equates the price discrimination with the required business injury. This interpretation violates the congressional intent of the Robinson-Patman Act and the language of Section 4 of the Clayton Act under which private suits for violation of the Robinson-Patman Act are instituted.

In 1936, when the Robinson-Patman amendment to the Clayton Act was enacted, Congress deleted Section (d) of the Robinson Bill prior to passage of the Act which provided for automatic damages. Section (d) reads in part, that:

> For purposes of suit under Section 4 of the [Clayton] Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment or grant involved in such violation. . . .

80 Cong. Rec. 6280 (1936)

On the other hand, Congress left undisturbed the preexisting section requiring injury to business or property for private recovery. 15 U.S.C. § 15 (1973) (originally enacted as Act of October 15, 1914, ch. 323, § 4, 38 Stat. 731).

Clearly, Congress intended to reject the automatic damages theory and limit recovery to actual business injury which was consistent with the already existing specific damage concept under the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*), the Sherman Act (15 U.S.C. 1 *et seq.*) and the Clayton Act (15 U.S.C. 12 *et seq.*). The *Fowler* decision fails to justify the use of automatic damages in light of the legislative history of the Act. The *Fowler* court stated: "We are unable to see any reason for legalistically equating or construing the Robinson-Patman Act upon identical lines with the Sherman Act as to the form of its remedial damage rights." *Id.* at 1252.

The Court did consider public policy in favor of encouraging private antitrust enforcement and the difficulty in proving actual damages as Judge Johnsen stated in *Fowler*:

> Furthermore, in a construction of the Act in relation to its purpose, it would seem apparent that such a direct-damage right would more effectively serve to curb the discriminations which Congress viewed as being most often exercised against smaller competitors, and whose abolition it sought to accomplish primarily for that reason, than the more difficult consequential-damage rule of the *Enterprise* case. In its significance of obtaining compliance with the Robinson-Patman Act, such a damage thrust is also more fully consonant with the motive which the Court recognized in *Bruce's* as underlying all private antitrust recovery, when it said: "It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good three-

> fold, with costs of suit and reasonable attorney's fee." 330 U.S. at 751-752, 67 S.Ct. at 1019.

Id. at 1252.

It appears though, from a look at legislative history surrounding enactment of the Act, that Congress felt recovery of treble damages was incentive enough to encourage private enforcement and did not feel it necessary to provide an award of damages without proof of actual injury. The rule of automatic damages was not provided by Congress but was legislated by the *Fowler* court. It is questionable that such court action was needed even to effectuate congressional policy.

> Experience in other antitrust actions indicates that a requirement of proof of actual injury does not hinder private enforcement. Under the Sherman Act, which requires strict proof of actual, pecuniary loss before damages are awarded, the number of private suits has substantially increased. The greater attractiveness of private antitrust actions under both Sherman and Robinson-Patman Acts has been primarily attributable to government aid and improved discovery methods, which make recovery easier for small competitors. These factors not in full effect at the time of the Robinson-Patman Act was enacted, plus the treble damage provision, make private enforcement and punishment of violators substantially assured. The holding of the Ninth Circuit in the [*Fowler*] case is therefore unnecessary and will only treat plaintiffs to unequalizing windfalls that are inconsistent with the purpose of the Act.

48 Tex. L. Rev. 690, 695 (1970) (footnotes omitted).

Another argument for automatic damages is that to require a plaintiff to prove actual damages is almost an insurmountable barrier. This argument has been a source of confusion in the courts due to the failure to separate the measure of proof needed to establish the fact of injury from the measure of proof needed to establish the amount of damage. But, it has become less persuasive since the lack of precise proof no longer blocks recovery in a private action. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

The required proof of injury is distinct from the required proof of the amount of damage resulting from a violation of the Act. Once the fact of injury is established, the amount of damage sustained must still be proved. Section 4 of the Clayton Act requires proof of the fact of injury, but once the fact of damage is established, the burden to show the amount of damage is less stringent. The principle which precludes recovery of uncertain damages only applies to the situation where the violation is not established to be the cause of damage; it does not prohibit recovery when causation is established and only the amount of damage is uncertain. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

The Ninth Circuit in *Flintkote, supra,* stated:

> We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to "make a just and reasonable estimate of the damage based on relevant data,

and render its verdict accordingly." *Bigelow* v. *RKO Radio Pictures, Inc., supra,* 327 U.S. at page 264, 66 S.Ct. at page 580.

Id. at 392.

Thus, once the fact of damage which includes causation has been established, the plaintiff may recover even if it cannot precisely prove the extent of the loss. Under the automatic damage theory, the plaintiff would be able to recover by merely showing an illegal price difference which is presumed to be the fact of injury and the amount of damage. Proof of actual injury certainly may be more difficult than automatic damages but not unreasonable given the possibility of receiving treble damages. To require less than proof of actual damages would conflict with the intent of Congress as reflected by the legislative history of the Robinson-Patman Act and places on the defendant the burden of disproving the specific elements of plaintiff's case. If Congress had intended to place such a burden on the defendant, the rule of automatic damages would not have been deleted from the original bill. An injured plaintiff may still expect just recovery from the courts for damages actually suffered and proved, plus recover for unproved injuries through treble damages without placing an unfair burden on the defendant.

The rule of automatic damages, aside from its historic demise in Congress, does not appear to be the rule of law currently followed by the courts. While the Ninth Circuit previously permitted automatic damages under Section 4, recent court decisions militate against recovery for automatic damages. The cases indicate that in order to recover treble damages for an illegal price discrimination, Section 4 of the Clayton Act requires the plaintiff to show two

actual causal effects. First, the plaintiff must prove that the price difference caused an actual adverse effect on competition. *Purex Corporation* v. *Procter & Gamble Company*, 596 F.2d 881 (9th Cir. 1979). Second, the plaintiff must prove that the price difference causing an adverse effect on competition actually injured the plaintiff in an amount that can be reasonably measured. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). One of the fallacies of *Fowler's* automatic damages standard is that it fails to conform to the requirements imposed by Section 4 of the Clayton Act. In the present case, the plaintiffs rely upon proof of Section 2(a) of the Robinson-Patman Act which requires only that the effect of such discrimination may be substantially to lessen competition or to injure, destroy or prevent competition. Proof of a violation of Section 2(a) establishes only that injury to competition may result. Once it is established that injury to competition may result, plaintiffs rely on *Fowler* to satisfy the requirements of Section 4 of the Clayton Act. Such proof, though it may be sufficient for the Federal Trade Commission to grant injunctive relief in the form of a cease and desist order (*FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948)), is not sufficient for recovery of treble damages in a private suit.

This Court concurs with the analysis of the Fifth Circuit in the recent decision of *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 1980-1 Trade Cases 63,067 (5th Cir. 1979) which distinguishes private injury in this suit from public injury in *Morton Salt*, both of which resulted from a Section 2(a) violation.

> Payne's reliance on *FTC* v. *Morton Salt Co.* . . . and its progeny is misplaced. In *Morton Salt*, the Supreme Court held that a violation of Robinson-Patman Act §2(a) may be inferred from a substantial price differ-

> ence. . . . But the showing necessary to establish a section 2(a) violation is not the same as the showing necessary to support a private action for damages. The Robinson-Patman Act is an incipiency statute. Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate the statute even though it will not support an action for damages. . . .([P]rivate injury does not necessarily accompany public injury.) What *Morton Salt* found inferable from a substantial price difference was a threat to competition sufficient to violate the statute. . . . Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury. As discussed above, it failed to do so.

Chrysler, supra at 77,308 (citations omitted).

In 1969, the Supreme Court held in *Perkins* v. *Standard Oil of California*, 395 U.S. 642 (1969), that "before an injured party can recover damages under the Act [Section 2(a)], he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Id.* at 648. Several years later, in 1977, the Court amplified its previous statement in *Perkins* in rendering its opinion in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra.*

In *Brunswick,* plaintiffs were seeking treble damages under Section 4 for violation of Section 7 of the Clayton Act. Section 7 proscribes mergers that may substantially lessen competition or tend to create a monopoly. Concerning Section 4, the Court stated that the treble damage provision allows awards only to injured parties and measures

the awards by a multiple of the injury actually proved. *Id.* at 485. The Court further stated:

> Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated § 7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not committed those acts. The Court of Appeals agreed, holding compensable any loss "causally linked" to "the mere presence of the violator in the market." . . . Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it. Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.
>
> Both of these consequences are well illustrated by the facts of this case. If the acquisitions here were un-

> lawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury—the loss of income that would have accrued had the acquired centers gone bankrupt—bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents, as the Court of Appeals itself acknowledged. . . . Thus, respondents' injury was not of "the type that the statute was intended to forestall."

Id. at 486-88 (citations and footnotes omitted).

The plaintiffs in the present case assert that *Brunswick*, which deals with a Section 7 illegal merger, adds nothing to the requirements of proof of a Section 2(a) price discrimination suit.

It is the opinion of this Court and others that the *Brunswick* analysis is relevant and controlling on the issue of automatic damages in a price discrimination suit. The plaintiffs in both the present action and *Brunswick* seek treble damage recovery pursuant to Section 4. *Brunswick* is not just a merger case under the Sherman Act but is the premier case defining injury for purposes of sustaining a private right of action under Section 4. That in itself is sufficient for *Brunswick* to be relevant. Also, there is no reason why a plaintiff seeking treble damages based on a Section 7 violation should be subject to Section 4 requirements while a plaintiff seeking treble damages under Section 2(a) is not, unless Congress clearly mandates such intent. This Court finds no such expression in either the language or the legislative history of Section 2(a), Section

7 or Section 4. *Brunswick* is particularly relevant to the present situation because both Section 7 and Section 2(a) require the same anticompetitive effect, i.e., may substantially lessen competition or tend to create a monopoly, attributable to defendant's illegal conduct which resul'ts in a compensable antitrust violation and injury. The difference in the two sections is the proscribed conduct—Section 7 proscribing illegal mergers and Section 2(a) proscribing illegal price discrimination. Clearly, Justice Marshall's analysis in *Brunswick* is applicable to price discrimination actions and that analysis militates against recovery of automatic damages. Thus, as the plaintiffs in *Brunswick* were required to prove more than the possibility that injury may result, so must the plaintiffs here prove more than the possibility of injury to recover under Section 4. Similarly in a price discrimination case, it is not the price differential itself which makes the defendant's conduct unlawful, just as it is not the merger itself which violates Section 7; rather it is the results of the illegal discrimination, the anticompetitive effects, which cause injury to the plaintiff that creates a cause of action.

Since *Perkins* and *Brunswick*, the Ninth Circuit has also required the plaintiff in private recovery actions to show causal connection and antitrust injury. In *Kapp* v. *National Football League*, 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 1996 (1979), the Court held, quoting *Brunswick*:

> The mere fact that some of the NFL's rules were found violative of the antitrust laws does not automatically produce damages for Kapp. He must prove that he was injured "by reason of" one of the unlawful practices. . . . The Supreme Court has recently ruled that the only damages recoverable in an antitrust suit are

those which occur by reason of that which made the defendant's actions unlawful. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* . . .

> Plaintiff must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research.* . . .

Even accepting that the restraints imposed by the challenged rules were unlawful under the Sherman Act, a jury question still remains as to whether, under the Clayton Act, those unlawful restraints were the cause of any loss Kapp may have suffered through his failure to play for the Patriots.

Similarly, the Ninth Circuit held, citing both *Brunswick* and *Kapp*:

> According to *Brunswick*, plaintiff must show more than it suffered injury causally linked to the antitrust violation; the injury must be shown to have "flowed" from the wrong. To "flow" from the wrong, *Brunswick* suggests, the loss must be "the type of loss that the claimed violations . . . would be likely to cause." . . . To be one of several causes is not enough. The injury must be of the type likely to be caused by the defendant's bad faith infringement action [the allegedly unlawful activity].

Handgards, Inc. v. *Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979). *Accord, e.g., California Computer Products, Inc.* v. *International Business Machines Corp.*, 1979-1 Trade Cas. ¶ 62,713 at 77,972 (9th Cir. 1979).

The present case is a classic example of why the rule of automatic damages is inappropriate for failure to require proof of causation. In this case, injury may have been caused by other nonantitrust factors such as the trend of the motoring public to purchase from self-service stations rather than the traditional full-service name brand station, economic factors, fuel shortage, independent pricing policies of retailers that were supplied by Gull and Dompier, nonfavored competitors and plaintiffs' individual problems. There is a real possibility that the plaintiffs in this case just as in *Brunswick*, may have been in the same identical position but with no compensable injury even without the price discrimination.

The plaintiffs assert that automatic damages appropriately consider the amount of discrimination as the antitrust injury which necessarily flows directly and proximately from the wrongful price discrimination. They contend that each has paid more than he should have lawfully paid, thus increasing the cost of operating his business by the amount of the discrimination resulting in a direct loss. Plaintiffs support their idea with *Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), in which the Supreme Court rejected a passing-on defense and held that one is injured by a price-fixing conspiracy and may recover the full amount of an overcharge without considering that the amount of the overcharge may have been passed-on by plaintiff to his retail customers. The precise argument made by plaintiffs has been expressly rejected by the courts. In *Uniroyal, Inc.* v. *Jetco Auto Serv., Inc.*, 461

F.Supp. 350 (S.D.N.Y. 1978), Judge Cannella dealt with this issue. *Jetco* was a Section 2(a) price discrimination case in which the court rejected any idea that damages may be presumed merely from the fact of discrimination and held that the plaintiff's failure to prove antitrust injury precluded recovery under Section 4 of the Clayton Act. This Court concurs with Judge Cannella's analysis of the relevance of *Hanover Shoe* to price discrimination.

> There was much legal argument over the effect of cases such as *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, . . . on the continuing viability of the Second Circuit's pronouncement in *Enterprise Industries, Inc.* v. *Texas Co.*, . . . that a Section 2(a) claimant must prove actual damage in order to recover under Clayton Act § 4. The court below had calculated damages by subtracting the discriminatory price from that charged plaintiff. The court of appeals found this erroneous and reversed.
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> Unlike *Enterprise Industries, Hanover Shoe* was an "overcharge" case, that is, one in which the price paid by the claimant was illegally high in and of itself. Because the plaintiff in such a case was wrongfully overcharged, he may recover the excess paid without regard to whether some other buyer, not overcharged, passed on the savings to his customers. According to Mr. Justice White:
>
> > As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower. . . .

Id. at 358-59 (citations omitted).

Like *Enterprise*, the present case involves price discrimination and not overcharge. The plaintiffs were not overcharged; rather certain competitors were undercharged. There was nothing illegal about the prices Texaco charged the plaintiffs except in comparison to the lower prices charged to certain competitors. Plaintiffs are not entitled to a lower price but only parity with competitors. Such being the case, damages should not be measured by an overcharge but by showing injury flowing from the undercharge. This reasoning is illustrated by a hypothetical:

> Let us assume that the plaintiff, a retailer, is charged $1.00 by the defendant while his competitor pays only 50 cents for the same product. Assume further that the going retail price for the product is $2.00, thus allowing our disfavored plaintiff a $1.00 mark-up. The favored competitor may decide that he would prefer to enjoy an additional 50-cent margin on each sale at the $2.00 retail price rather than attempt to capture additional sales by lowering his price to reflect his lower cost. In that event, the favored buyer may well have benefitted from the discrimination, but it would be difficult to conclude that the plaintiff has suffered any injury at all. Had he received the lower price, he would have made more money, but he is not out of pocket because a competitor bought more cheaply.

M. Handler, *The Shift from Substantive to Procedural Innovations In Antitrust Suits—The 23 Annual Antitrust Review*, 71 Colum. L. Rev. 1, 33 (1971).

Justice Cardozo some years earlier and in a different context distinguished between overcharge and discrimination:

> When discrimination . . . is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered. . . . It is an evidentiary circumstance to be viewed along with others in the setting of the occasion. It is not the measure without more. . . .
>
> Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted . . . is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. . . . But a different measure of recovery is applicable "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less." . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less . . . but which, whether more or less, is something to be proved and not presumed. . . . "Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted." . . . The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

ICC v. *Campbell*, 289 U.S. 385, 389-90 (1933) (citations omitted).

And in *Enterprise Industries, Inc.* v. *Texas Company*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), Judge Learned Hand found his analysis applicable speci-

fically to claims of price discrimination under the Robinson-Patman Act:

> "If by reason of the discrimination the preferred [purchasers] have been able to divert business that would otherwise have gone to the disfavored [purchasers], damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the [disfavored purchasers] to sell at a lowered * * * price * * *, damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

240 F.2d at 460 (quoting from *Campbell*, 289 U.S. at 390-91) (citation omitted).

The Supreme Court in *Brunswick, supra*, confirms *Enterprise*. While a disfavored purchaser paying more for the same product than a favored purchaser may cause economic injury to plaintiff's pocketbook, it does not necessarily amount to antitrust injury or represent the proper measure of antitrust damages if it does cause antitrust injury. Antitrust injury is suffered where it can be shown that the favored competitor, by virtue of his lower cost, lowered his resale price so that the plaintiff either lost sales by not reducing his price or lost profits by reducing his price. *See*, M. HANDLER, *Changing Trends in Antitrust Doctrine, An Unprecedented Supreme Term—1977*, 77 COLUM. L. REV. 979, 993 (1977). *See, e.g. Uniroyal Inc.* v. *Jetco Auto Serv., Inc.*, 461 F.Supp. at 359.

The actual damage measure of *Enterprise* has expressly been acknowledged and applied in cases decided in the Ninth Circuit. Thus, in *Youngson* v. *Tidewater Oil Com-*

pany, 166 F.Supp. 146, 147 (D. Or. 1958), the Court held, citing *Enterprise*:

> In my view, to come within the reach of the provisions of the Robinson-Patman Act, one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one's inability to meet their prices, or both.

Moreover, *Youngson* was cited and followed for the proposition that Section 2(a) of the Robinson-Patman Act requires proof of a discrimination which "caused injury to the plaintiff" in *Rutledge* v. *Electric Hose & Rubber Company*, 511 F.2d 668, 677 (9th Cir. 1975).

It is important to note that while plaintiffs assert *Fowler* as being the present law in the Ninth Circuit, *Rutledge* is a case decided several years after *Fowler*. As the Ninth Circuit relied on *Youngson* in *Rutledge* and not *Fowler*, *Youngson* is the Circuit's controlling expression of the law concerning damages in Robinson-Patman cases.

It appears to this Court, given the Supreme Court decisions in *Brunswick* and the Ninth Circuit opinions of *Rutledge*, *Kapp*, *Handgards* and *California Computer Products* that are consistent with opinions cited from other circuits, that the consequential damage rule of *Enterprise*, rather than the automatic damage rule of *Fowler*, is the present law in the Ninth Circuit. Indeed, Judge Cahn of the Eastern District of Pennsylvania so observed in a recent opinion:

> In *Fowler* the court of appeals held that the amount of the discrimination can serve as the basis and measure of damages under the Robinson-Patman Act. Sweeney

therefore argues that it needs to do nothing more than establish the discrimination to succeed on his claim. After reviewing *Fowler* and cases decided before and after it, I find that it does not represent the law of this circuit and probably would not represent the law of the Ninth Circuit today.

. . . Moreover, *Fowler* appears to contravene the principles announced by the Supreme Court in cases decided after it. Thus in *Perkins* v. *Standard Oil Co.* . . . the Court held that

> Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered.

395 U.S. at 648. To hold as the court did in *Fowler* that a plaintiff need only prove discrimination, would run afoul of the Court's directive to require proof of a connection between the discrimination and the injury.

More recently, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* . . . the Court affirmed and even expanded the principles which it had announced in *Perkins*. In *Brunswick* the Court held that to recover,

> Plaintiffs must prove *antitrust* injury which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

429 U.S. at 489 (emphasis in original). As one commentator has noted, *Brunswick* shows

> [T]hat cognizable injury in a section 2(a) case is to be traced *not* to the higher price paid by the plaintiff (the overcharge)—since the infraction is a price *difference* and all the law requires of the seller is a parity in pricing—but rather to the *undercharge* to plaintiff's competitor. . . . It is the harm from the discrimination, that is, the undercharge and not from the overcharge which constitutes antitrust injury in the *Brunswick* sense (emphasis in original).
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> . . . Since there is no evidence of how many customers Sweeney lost to competitors as a result of the alleged discrimination, as required by Enterprise, Sweeney has failed to provide a basis upon which the jury could determine the extent of injury, if any, which Sweeney suffered as a result of any price discrimination in which Texaco may have engaged.
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> • • •
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> Due to Sweeney's failure to show any injury as a result of Texaco's alleged violation of § 2(a) of the Robinson-Patman Act or produce any basis on which the jury could compute its alleged damages, there was no need to submit the issue of liability to the jury.

Edward J. Sweeney & Sons, Inc. v. *Texaco, Inc.*, 1979-2 Trade Cas. ¶ 62,951 at 79,429-31 (E.D. Pa. 1979) (citations and footnotes omitted). *Accord Uniroyal, Inc.* v. *Jetco Auto Service, Inc.*, 461 F.Supp. at 359.

The Fifth Circuit, in a very recent decision that supports the consequential damage theory, required plaintiff to prove actual pecuniary loss, in the form of lost sales or profits, as a result of an illegal undercharge to a favored purchaser.

We find it unnecessary to consider whether Payne proved that the Chrysler incentive programs violated the Robinson-Patman Act. Because Payne failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, the district court erred in refusing Chrysler's motions for directed verdict and in denying Chrysler's motion for judgment notwithstanding the verdict.

I. *Cognizable Injury*

To show that Chrysler's incentive programs caused it to lose sales, Payne introduced the unsupported testimony of J. Truett Payne, its owner, that customers and salesmen had told him that the dealership was being undersold, and that some salesmen had quit as a result. Payne also introduced evidence showing that its share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contends that it was proper to infer that the 4% drop in 1972 was a result of the incentive program.

To show lost profits by reason of the programs, Payne introduced only the unsupported testimony of Mr. Payne that he was forced to lower prices in order to meet competition and that for the same reason the dealership had to, or possibly had to, give greater allowances on used-car trade-ins.

In an effort to show that the programs forced the dealership out of business, Payne relied on merely conclusory statements to that effect by Mr. Payne and an expert witness.

> [T]his showing was clearly not such as to allow the case to go to the jury. In an antitrust action as noted above, the plaintiff must show that the defendant's conduct materially contributed to his injury. . . . He must do so "as a matter of fact and with a fair degree of certainty." . . . Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either. The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict.

Chrysler Credit Corp. v. *J. Truett Payne, Inc., supra* at 77,306-07 (citations and footnotes omitted).

The Court rejected the rule of automatic damages:

> Payne maintains on this appeal that in a section 2(a) case mere proof of the alleged price discrimination is sufficient to establish injury by reason of an antitrust violation entitling the plaintiff to damages. This Robinson-Patman "automatic damages" concept, as it has come to be called, has some precedential support. . . . But we decline to follow it. As the Supreme Court ruled in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, . . . the antitrust laws do not provide a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result. Both the statute and the courts recognize this.

> 15 U.S.C. § 13(a). *See, e.g., United States* v. *United States Gypsum Co.* . . . Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. *See, e.g., Enterprise Industries, Inc.* v. *Texas Co.*; . . . *Uniroyal, Inc.* v. *Jetco Auto Service, Inc.*; . . . *McCaskill* v. *Texaco, Inc.*; . . . *Harrelson* v. *Texaco, Inc.* . . . *See also Perkins* v. *Standard Oil Co.* . . . (implying that disfavored purchaser must show more than mere price difference to recover damages) As discussed above, there is no evidence, much less substantial evidence, that such was the case here.

Id. at 77,307-08 (citations omitted).

Concerning the amount of damages that Court held:

> Our conclusion that Chrysler was entitled to a directed verdict is buttressed by Payne's failure to adequately prove the amount of its alleged injury.
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> • • •
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> Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one. A price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going concern value. On this ground as well, Chrysler was entitled to a direct verdict.

Id. at 77,308-09 (citations omitted).

The automatic damage rule in *Fowler* on which this case was tried and submitted to the jury is not the rule of law

in the Ninth Circuit. And, since plaintiffs admitted that they could not, and in fact did not, prove any consequential damages, Texaco is entitled to judgment in its favor notwithstanding the verdict.

B. *Fowler Does Not Apply to the Facts of This Case*

It is the opinion of this Court that the automatic damage rule set forth in *Fowler* is no longer the rule of law in the Ninth Circuit. But, if *Fowler* is determined to be viable, its application is limited to the specific factual situation of *Fowler* and does not apply to the facts of this case. The instructions given the jury in this case were based on *Fowler*. However, *Fowler* did not establish mandatory automatic damages, and in fact, acknowledged that it might not be appropriate in a case like this. The instructions given erroneously dictate that automatic damages are mandatory. Recognition of such an error requires the granting of judgment in favor of Texaco, notwithstanding the verdict.

An understanding of *Fowler* requires consideration of the leading cases prior to *Fowler*. The two leading cases offering opposing views are *Elizabeth Arden Sales Corporation* v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945), and *Enterprise Industries, Inc.* v. *Texas Company*, 240 F.2d 457 (2nd Cir.), *cert. denied*, 353 U.S. 965 (1957). *Elizabeth Arden* held only that automatic damages could be recovered "in situations where the amount of the discrimination properly can be said to constitute a direct and legal damage" as they could in that case. 150 F.2d at 966. And the reason the amount of discrimination there constituted "a direct and legal damage" was because the claim of injury arose under Sections 2(d) and (e) of

the Robinson-Patman Act, a violation of which required only a discrimination in the granting of services, or the payments therefor, but no adverse competitive effect. In such a situation, it was obvious that the injury to the disfavored purchaser and the violation of the statute were one and the same and measured by the amount of inequality involved. This, and no more, was what the Court held.

> The subsections of the Robinson-Patman Act that are here involved, unlike the prohibitions in the Interstate Commerce Act, are not designed to prevent the furnishing of clerk's services or the payment of clerk's salaries to any customer, but their purpose on the contrary is to require and assure that such services or salaries, in whatever amount they may be furnished or paid to any customer, shall be made available to every other competing customer on proportionally equal terms. What the seller is thus both permitted and commanded to do, we can see no sound reason under the language or policy of the statute for not compelling him to do by an action for general damages, where such damages have been directly suffered and are plainly measurable. Thus, in the present case, it is obvious, as the trial court found, that appellee has sustained a direct loss in "the increased cost of the operation of its cosmetic department", to the extent of the difference in the allowances, which were arbitrarily made and without any proportionalized basis or standard.

Id. at 996. And the court expressly recognized that such a measure of damages might be inappropriate in other factual situations:

> We do not mean to imply, of course, that every situation under the Robinson-Patman Act is subject to a general damage right. Discriminations obviously are possible, from whose nature there can be no direct or general damages but only consequential or special damages.

Id. The court further stated, in recognition of the fact that the original Robinson-Patman Act contained a provision for automatic or general damages but was omitted, that in "those situations where only special or consequential damages can possibly exist, the effect of its [general damages provision] omission would simply be to require that the amount of such damages must be specifically proved." *Id.*

Elizabeth Arden was followed shortly thereafter by a second Eighth Circuit opinion—*American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), a case in which the court refused to grant, under Section 2(a) of the Robinson-Patman Act, the automatic damages which it had permitted to be recovered in *Elizabeth Arden*. This denial of automatic damages was predicated on the finding that the plaintiff therein had not proved that it had in fact suffered business injury. *Id.* at 55-56. Moreover, the court recognized that where the amount of the discrimination was warranted, at least in part, by the cost-saving functions performed by the favored purchaser, the full amount of the discrimination clearly could not be the measure of damages:

> It is apparent that the defendant must have saved a substantial amount in labor costs and in the maintenance of facilities for shipment by rail, by not having to store, pack, load into cars, and deliver by rail, the

> cans made at the Austin factory. Whether the saving amounted to 45¢ a thousand cans is problematical. If the plaintiff's business had been shown to have been adversely affected by the prices charged by Morgan for its dissimilar canned products because of the allowance made to Morgan, the damages, we think, would be limited by the amount, if any, by which the allowance exceeded the cost savings of the defendant resulting from the runway delivery. That excess could not have amounted to 45¢ per thousand cans. To the extent that the allowance to Morgan was justified by savings in delivery costs, it could have caused no damage to Morgan's competitors and constituted no actionable wrong on the part of the defendant.

Id. at 56. Quite obviously, therefore, a discrimination which caused no damage could not be the measure of any damage recovery. Just last year, the Eighth Circuit again refused to award damages under Section 2(a) even in a nominal amount when it found that the plaintiff had not in fact lost any business as a result of the discrimination. *Swicker* v. *J. I. Case Company*, 596 F.2d 305 (8th Cir. 1979).

Two years after *Elizabeth Arden*, in dictum, the Supreme Court in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), suggested, without deciding, that automatic damages were appropriate "in the absence of extraordinary circumstances." *Id.* at 757. However, in 1957, Judge Learned Hand, in the *Enterprise* decision, after considering the court's statement in *Bruce's Juices*, held that a disfavored customer is not necessarily injured in his business or property by reason of a price discrimination in his competitor's favor but that he must prove injury in loss of profits or

customers to receive treble damages under the Clayton Act. The Supreme Court denied certiorari in *Enterprise*.

It was in this context that Judge Johnsen of the Eighth Circuit, sitting by designation, wrote the *Fowler* opinion. At the very outset, he acknowledged that *Elizabeth Arden* had awarded the amount of discrimination as the measure of damage where it was consistent with "legal and commercial realities" indicating that the disfavored purchaser had at least been injured in that amount in his business or property. *Fowler, supra* at 1250. Moreover, he held only that an award of automatic damages was permissible, not that it was mandatory:

> [W]e hold that under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award.

Id. at 1252 (footnote omitted). Finally, Judge Johnsen did not hold that automatic damages had to be granted in a factual situation such as that which existed in *Russellville*—that is, where at least a portion of the amount of the discrimination compensated for cost-saving functions performed by the favored purchaser. *Id.* at n.3. *Fowler* thus clearly left open the question of whether where, as here, the supplier grants the favored purchaser what is admittedly, at least at times, a legitimate functional discount, a court may award damages measured by the amount of discrimination accorded that favored purchaser.

In considering the dictum of the Supreme Court in *Bruce's Juices* in support of automatic damages in that

particular case and the decisions in *Elizabeth Arden* and *Fowler* awarding automatic damages, those results do not require awarding automatic damages in this case. An award of damages may have been appropriate in the factual circumstances of those cases. All three of those cases were relatively simple examples of price discrimination in which it was clear that the amount of damage was at least the amount of the discrimination. Considering *Fowler*, each of the favored purchasers was a principal competitor of the disfavored purchaser across the entire market area. Moreover, the product which was subject to the discrimination was the single most important product sold by the plaintiff and the favored purchasers. On these facts, there was little question of substantial competition, little question of different forms of disposition of the product and, consequently, little question that the occurrence of the discrimination actually resulted in competitive injury to the plaintiff—the only disfavored purchaser. Simply stated, the automatic damages awarded in *Fowler* were virtually the equivalent of actual consequential damages.

The facts of this case do not allow such conclusions without more. This case is sufficiently more complicated because of the presence of multiple plaintiffs who must each show antitrust injury resulting from an undercharge to Gull or Dompier. The Court instructed pursuant to *Fowler* that the proper measure of damages is calculated by multiplying the cents per gallon discrimination by the number of gallons each plaintiff purchased during the continuance of the discrimination. Assuming that only one Dompier or Gull supplied competitor of plaintiffs purchased gas for a lower price and sold it at a lower price than the plaintiffs, under the automatic damage

theory, it is presumed that all plaintiffs, even though operating in different areas of Spokane, have directly suffered a loss equal to the cents per gallon discrimination multiplied by the number of gallons each purchased. Such an award bears no relationship to actual injury and illustrates the possibility of an absurd result if *Fowler* is applied in a multiplaintiff suit.

This case is further complicated by the presence of principal competitors of the plaintiffs who were not favored customers of Texaco, many of which sold at a lower retail price than the plaintiffs. The evidence discloses that these competitors of plaintiffs who did not purchase from Texaco existed in the same locality or same traffic flow as the plaintiffs. This raises the question of causation—was it the conduct of the defendant that caused plaintiffs' injury, if any, or was it some other factor such as the lower price of a competitor who did not purchase from Texaco. The existence of nonfavored customers who did not purchase from Texaco vividly illustrates the inapplicability of *Fowler* which does not contemplate that other factors could have caused the alleged injury.

While multiple plaintiffs and nonfavored competitors must be considered, there are also other factors that might have caused plaintiffs' injury. The record indicates that plaintiffs were all operators of the traditional, full-service stations which provided filling the tank with gasoline, washing windows, checking oil and tire pressure, and other services to the motoring public, all as a matter of course with the sale of gasoline. But, during the period of time of this suit, there was a change in the practice of the motoring public. There developed many self-service stations which allowed the customer to pump his own gasoline and forego the additional services for a lower price.

These stations could be operated much more economically as they sold a higher volume at a lower operating cost per gallon. The motoring public patronized this method of operation and from 1972 to 1979 these stations became increasingly successful while full-service stations declined in sales or made only slight progress. In addition, there were other developments occurring. Business began to specialize in the sale of tires, batteries, tune-ups and services which provided fast service and reduced prices, all of which pulled business away from the full-service stations. These developments occurred as a response to consumer demands and not because of defendant's conduct.

Some other possible factors that might have caused injury to the plaintiffs were the individual circumstances affecting the performance of each station. For example, John Bevan had health problems that limited his activities at his stations and Al Allen suffered a heart attack in 1975. The lower pump prices of the Dompier or Gull-supplied stations may have been the result of Dompier or Gull's independent pricing decisions or the independent pricing decisions of Dompier and Gull's customers rather than resulting from Texaco's conduct. The plaintiffs also sold at varying retail prices and thus plaintiffs themselves may have been the cause of loss of business to each other.

The record demonstrates a number of factors which could have affected plaintiffs adversely. Evidence produced at trial raises the possibility that the other factors just mentioned may have had an effect. Plaintiffs recovered for claims of injury during the entire period beginning in 1972. During that period, plaintiffs admit that some of the sales were legal—where a plaintiff was buying at a lower price than a competitor. The evidence drew no distinction between periods of legal sales and periods

of illegal sales. This failure may indicate that Texaco's alleged illegal conduct made no difference to any injury caused plaintiffs. If the injury continued when the illegality was not present, it is probative evidence that some other factors caused the injury. Further, if the price discrimination between plaintiffs and favored competitors was the cause of plaintiffs' injury, the plaintiffs should be able to match up their losses with gains to the favored competitors. The evidence failed to significantly demonstrate that plaintiffs lost business to the favored customers which may also indicate that any injury was not attributable to Texaco's illegal conduct.

The purpose in discussing the possible factors is not to determine the actual cause but to illustrate the inapplicability of *Fowler* in situations where more than one causative factor exists. *Fowler* does not deal with the issue of causation and cannot be controlling where causation is an issue. If the presumption that the price discrimination caused the injury is allowed where causation is an issue, then a plaintiff may recover for a non-antitrust injury—an injury the antitrust laws did not intend to prohibit. "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Brunswick, supra* at 489.

Other courts recognize the importance of proving causation when more than one causative factor is involved. A plaintiff cannot recover for damages which measure an injury which is attributable to other causes. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). ("If [plaintiff's] failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of [defen-

dant's] unlawful conduct, [plaintiff] would not have met its burden under Section 4." *Id.* at 126-27.)

Indeed, if damages flowed from any action by Texaco itself which was *unrelated* to the antitrust violation, then any claim for damages must be *reduced* by the damages caused by those unrelated factors. Thus, in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073, 1075-76, n.3 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), the court held that antitrust damages had to be reduced by any damages caused by defendant's breach of contract, in which the antitrust wrong was not a substantial factor: "If the damages flowed in part from the nonantitrust wrong and the antitrust wrong was not a substantial factor in producing that part, damages for the antitrust wrong will be accordingily diminished."

A plaintiff is required to prove actual injury in fact; the plaintiff is required to show that the injury and damages would not have occurred "but for" the lower price to Gull or Dompier. *Purex Corporation* v. *Procter & Gamble Company*, 596 F.2d 881 (9th Cir. 1979). ("Of course, Purex must prove injury in fact and Purex cannot recover for profits that would never have been earned even if the acquisition had not occurred." *Id.* at 888 n.6.) *See, also, e.g., Mt. Hood Stages, Inc.* v. *Greyhound Corporation*, 555 F.2d 687, 702 (9th Cir. 1977); *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1206-07 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

A plaintiff must show proximate cause. That is, he must show that the defendant's illegal action was a substantial cause of the injury to plaintiff. "To be one of several causes is not enough." *Handgards, Inc.* v. *Ethicon, Inc.*, *supra* at 997.

Where other factors, as well as the illegal conduct of defendant, could have caused injury to the plaintiffs, the plaintiffs must show that it was defendant's conduct and not the other factors that caused the injury. *See, e.g., Mt. Hood Stages, Inc.* v. *Greyhound Corporation, supra; Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *ILC Peripherals Leasing Corporation* v. *International Business Machines Corporation*, 458 F.Supp. 423 (N.D. Cal. 1978) (factors to explain away included competition from other companies and lawful competition by the defendant).

The plaintiffs in this case relied on *Fowler* and did not attempt to prove causation. But *Fowler* did not confront the question of causation since there, unlike here, causation was not an issue. Therefore, the *Fowler* case cannot be precedent where causation is an issue. The plaintiffs cannot rely on *Fowler* and without it, their case on causation is legally insufficient.

The issue of causation was confronted by the Court in *Youngson* v. *Tidewater Oil Company, supra*, as there not all of the competitors of plaintiff had benefitted from the price discrimination. The same problem—that of separating losses caused by competitors who did not receive the benefit of price discrimination from losses to favored customers—was present in *Enterprise, supra*. In both *Youngson* and *Enterprise*, the court held that the plaintiff had to show that his gallonage was lost to the favored customers and not to the other competitors in order to prove causation. *Youngson* remains valid law in the Ninth Circuit as to the necessity of proof of causation. *Rutledge* v. *Electric Hose and Rubber Company, supra* at 677. The presumption that the price discrimination is the cause of injury where

the facts disclose several causative possibilities would allow grossly inaccurate damages resulting in great injustice to Texaco and other defendants in cases of this nature.

The importance of requiring proof of causation is illustrated by another aspect of this case. Certain plaintiffs—John Bevan, James Sills and Ralph Webber—admitted that during the so-called energy crunch or allocation period, they sold all the gasoline they could get at the maximum price allowed by law during that period. These plaintiffs could not have been injured due to lost sales which could have entitled them to damages. Neither could these plaintiffs have claimed injury from a loss of gross margin on sales due to paying a higher price to Texaco, even if it were relevant to the Robinson-Patman Act, because under the applicable energy regulations, any plaintiff selling at his maximum price would have to pass on to his customers any price reduction received from Texaco; thus the gross margin could not have increased by any lower price paid to Texaco. Obviously, the award of automatic damages under these conditions is a complete windfall, illustrative of the inappropriatness of *Fowler*.

While the issue of causation is illustrative of *Fowler's* inapplicability to the present case, the greatest failure of the plaintiffs' case is their admitted inability to specify any particular loss in reliance on *Fowler*. The Court finds that *Fowler* is inapposite to the facts of this case and that the jury was erroneously instructed on the basis of *Fowler*. Since damages were not proved, neither the fact of damages nor the amount of damage, the Court should have granted Texaco's motion for a directed verdict, and having failed to do so, now grants the motion for judgment in favor of Texaco notwithstanding the verdict.

IV. Defendant's Motion for New Trial

In the alternative, the defendant has moved for a new trial based on the same grounds upon which defendant's motion for judgment notwithstanding the verdict was made. In the event that the judgment notwithstanding the verdict granted by this Court is vacated or reversed, defendant's alternative motion for a new trial should be denied.

In the motion, defendant lists a number of reasons supporting a new trial. In considering the evidentiary reasons, the Court is not free to weigh the evidence or substitute the judgment of the facts for the jury. Instead, it must view the evidence most favorable to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. With that in mind, the Court must conclude that there is sufficient evidence to support the plaintiffs' case and preclude the Court from interfering with the jury's determination based on the instructions provided the jury.

In considering the nonevidentiary reasons for a new trial, without specific discussion of each, the Court feels that none of the reasons asserted mandate a new trial in the event the circuit court accepts the *Fowler* decision to be the rule of law applicable to this case.

However, the defendant does raise a matter that merits further consideration. The defendant presents a meritorious argument when it points out that three of the plaintiffs, Bevan, Sills and Webber, admitted that during certain periods of the energy allocation years, they sold all the gasoline they could get at the maximum price allowed by law, precluding the possibility of injury attributable to defendant's conduct. It is the opinion of this Court that

such a windfall recovery illustrates the inequity inherent in *Fowler* when applied to a case of this nature. Nevertheless, if the Ninth Circuit determines that *Fowler* is applicable to the facts of this case, then plaintiffs are entitled to recover the damages the jury awarded regardless of the effect of the energy allocation or any other factor present in this case.

Therefore, in the event that the judgment notwithstanding the verdict granted by this Court is vacated or reversed, defendant's alternative motion for a new trial should be denied.

V. Attorneys Fees and Costs

It is the Court's opinion that each party should bear the responsibility of their own attorney's fees and costs of litigation in this matter. Considering the plaintiffs' reliance on *Fowler,* an opinion of the Ninth Circuit that plaintiffs considered applicable and controlling in this case, and the vast disparity in financial resources between the defendant and the plaintiffs, the Court's decision not to award attorney's fees and costs appears both reasonable and equitable.

Dated this 26th day of March, 1980.

/s/ Marion J. Callister
Marion J. Callister
United States District Judge

Order Amending Memorandum Decision Filed March 31, 1980

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

No. C-76-27

RICKY HASBROUCK, *et al.*,

Plaintiffs,

—VS—

TEXACO OIL COMPANY, INC.,

Defendant.

Plaintiffs have moved the Court for an amendment to or a correction of the Court's Memorandum Decision granting defendant's motion for judgment notwithstanding the verdict. The plaintiffs' motion concerns their proposed Instruction No. 55 and the instruction given by the Court, No. 43, which instructed the jury on the appropriate measure of damages as outlined in the *Fowler* decision. At a preliminary, informal instruction conference where the proposed Instruction No. 55 was discussed, it was pointed out by Texaco that there was no proof of damages which would permit the jury to find damages for the plaintiffs. Texaco maintained that with regard to the question of the measure of damages that the *Fowler* case was not the law of the Ninth Circuit and should not be followed, but if it were followed in this case, the jury should be instructed that it is the only measure of damages which would be permitted since there was no proof of any other

Order Amending Memorandum Decision
Filed March 31, 1980

damages sufficient to sustain a jury verdict. Plaintiffs' counsel acknowledged and the Court was of the opinion that plaintiffs' proof would not sustain a finding of damages on any other theory than the *Fowler* decision. Therefore, the Court was of the opinion that if the jury found that damages should be awarded that it had to compute damages based upon the *Fowler* decision and so instructed the jury. The Court was also of the opinion that if the *Fowler* case was not to be followed, that the defendant was entitled to a directed verdict at the end of plaintiffs' case because there were no damages sufficiently proven to sustain a jury verdict.

IT IS, THEREFORE, ORDERED that plaintiffs' motion to correct the Memorandum Decision so that it reflects what has been outlined above should be, and the same is hereby, GRANTED.

DATED this 28th day of April, 1980.

/s/ MARION J. CALLISTER
MARION J. CALLISTER
United States District Judge

Statutes Involved

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13, are as follows:

> § 2(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price beween different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .
>
> (b). Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

> § 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the

defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

List of All Parent Companies, Subsidiaries and Affiliates of Texaco Required by Rule 28.1

Parent

Texaco Inc.

Subsidiaries

Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigeria) Limited
Quimica Industrial "FIDES" S.A.
Texaco Canada Inc.
Public Fuel Transmission Systems Limited
Great Eastern Oil & Import Co. Limited, The
Texaco Norway A/S
Deutsche Texaco Aktiengesellschaft
Texaco Portugal Prospeccao Producao, S.A.R.L.
Texaco Exploration Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.
Texaco Nigeria Limited
Texaco-Cities Service Pipe Line Company
Tadlaqaz S.A.
American Overseas Petroleum Limited
Bunkerservice Brunsbuttel GmbH
Societe Ivoirienne De Futs et D'Emballages (SIFEMBAL)
Societe Guineenne De Lubrifiants et D'Emballages (SOGUILUBE)
Caltex Petroleum Corporation
Australian Lubricating Oil Refinery Limited
Phoenicia Oil Company S.A.L.
Botany Bay Tanker Company (Australia) Pty. Limited
Sydney Metropolitan Pipeline Pty. Limited

List of All Parent Companies, Subsidiaries and Affiliates of Texaco Required by Rule 28.1

Koa Oil Company, Limited
Mediterranean Refining Company
Nippon Petroleum Refining Company, Ltd.
Tokyo Tanker Company, Limited
Caltex Deutschland GmbH
Caltex Mediterranean Limited
Condea Chemie GmbH
Federated Pipe Lines Ltd.
Flexibox GmbH
LPG de Panama, S.A.
Pembroke Capital Company Inc.
P.T. Caltex Pacific Indonesia
Petrogas, S.A.
Texaco Maroc
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Societe Ivirienne D'Entrepasage De Produits Petroliers (S.I.E.P.P.)
Texaco Ghana Limited
Mamafil Limited

Affiliates

Badger Pipe Line Company
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Colonial Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company
Laurel Pipe Line Company

List of All Parent Companies, Subsidiaries and Affiliates of Texaco Required by Rule 28.1

LOCAP Inc.
LOOP Inc.
Olympic Pipe Line Company
Portland Pipe Line Corporation
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
Aktiebolaget Svensk Petroleumlagring
Alberta Products Pipe Line Ltd.
Arabian American Oil Company
Associated Octel Company Limited, The
Aviation Fuel Services Ltd.
Boral Limited
New Zealand Refining Company Limited, The
South Africa Oil Refinery (Proprietary) Ltd.
Batangas Land Company Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Central African Petroleum Refineries (Private) Ltd.
East African Oil Refineries Limited
H. C. Sleigh Limited
Pakistan Refinery Limited
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage (S.R.E.)
Cia. Refinadora Petrolera Santo Domingo Inc.
Deutsche Transalpine Olleitung GmbH
Forenade Svenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiano S.A.

List of All Parent Companies, Subsidiaries and Affiliates of Texaco Required by Rule 28.1

Ghana Bunkering Services Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Maghreb Gaz S.A.
Mainline Pipelines Limited
Milan Airport Refueling Services, S.p.A. (MARS)
Mitsui-Texaco Chemicals Co., Ltd.
Montreal Pipe Line Company Limited
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberheinische Mineralolwerke G.m.b.H.
Pars Investment Corporation
Pipelines of Puerto Rico, Inc., The
Raffinerie du Sud-Ouest S.A.
Rheem del Ecuador C.A.
Rhein-Mein Rohrleitungstransportgesellschaft mbH
Saudi International Petroleum Carrier Ltd.
Sierra Leone Petroleum Refining Company Limited, The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe D'Entreposage de Bobo-Dioulasso
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe De Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)

List of All Parent Companies, Subsidiaries and Affiliates of Texaco Required by Rule 28.1

Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
Svensk Petroleum Forvaltning Aktiebolag
Tankanlage AG Ruemlang (TAR)
Texaco Mexicana, S.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinmar Limited
Trintovac Developments Limited
United Kingdom Oil Pipelines Limited
Unterflur Betankungsanlage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services des Entreprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardsberg
Association Petroliere Belge
Aviation Fueling Services,S.A.
Aviation Service Center
Compagnie d'Entreposage Communautaire
Singapore Refining Company Private Limited
Societe Belge de Transport Par Pipeline S.A.
Societe du Pipeline Sud-European S.A.
Svensk Petroleumadministration AB
Total Centrafricaine de Gestion
Societe Agricole des Entreprises Petrolieres
Union des Raffineurs Belges
Svensk Petroleumlagring Tre Aktienbolag
Societe Cameraunaise des Depots Petroleirs (SCDP)
Trans-Northern Pipelines Inc./Pipelines Trans-Nord Inc.
AK Chemie GmbH & Co. KG

List of All Parent Companies, Subsidiaries and Affiliates of Texaco Required by Rule 28.1

Bergemann KG
Ful-Tex Euro Services Inc.
Drapol International Limited
Caltex Australia Limited
Bahrian National Gas Company (B.S.C.)
Honam Oil Refinery Company, Limited
West Australian Petroleum Pty. Limited
Korea Tanker Company, Limited
Farmer Construction Limited
Nippon Oil Staging Terminal Company, Limited

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NO. 81-2136

IN THE

Supreme Court of the United States

October Term, 1981

TEXACO INC.,
Petitioner,

v.

RICKY HASBROUCK, d/b/a Rick's Texaco, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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TEXACO INC.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF FACTS

This antitrust case was brought by plaintiffs-respondents under the Robinson-Patman Act, 15 U.S.C. § 13. The plaintiffs, operators of Texaco retail gasoline stations in Spokane, Washington, alleged that Texaco unlawfully discriminated in price against them by selling identical gasoline at substantially lower prices to other customers who operated chains of retail gasoline stations which competed with plaintiffs. The plaintiffs alleged that they were injured in their businesses and properties by reason of the discrimination.

A jury found that Texaco had violated the Robinson-Patman Act for more than 7 years. The jury also concluded — despite vigorous arguments by Texaco to the contrary — that the violation had caused injury to the plaintiffs, and returned a verdict for plaintiffs equivalent to an average of $10,891 per year for each plaintiff. The district court held that the evidence was sufficient to support the jury's finding of a violation of the Act.[1]

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1. The district court held that

> [T]here is sufficient evidence to support the plaintiffs' case and preclude the court from interfering with the jury's determination based on the instructions provided the jury.

The district court instructed the jury based upon *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). That opinion held that, absent extraordinary circumstances, unlawful price discrimination constitutes business injury under the antitrust laws, entitling the plaintiff to recover at least the amount of the discrimination. On several occasions both before and during the trial, Texaco had argued to the district court that the *Fowler* rule was not applicable to the facts of this case or, if applicable, that *Fowler* was no longer valid law. On each occasion, the district court rejected Texaco's argument, holding that *Fowler* was valid and applicable. Indeed, the district court instructed the jury that the *Fowler* rule "is the appropriate way in which damages should be measured in this case." Tr 4285.

Seven months following the verdict, however, the district court changed its mind. Although expressly finding that plaintiffs had introduced sufficient evidence to prove a violation of the Robinson-Patman Act, in a Memorandum Decision the district court for the first time held that *Fowler* did not apply, or if it applied, that it was no longer valid law. The court thus concluded that the jury instructions which the court had given based on *Fowler* were erroneous.

The district court did not order a new trial on proper instructions, but instead entered judgment n.o.v. for Texaco. Plaintiffs appealed from the judgment n.o.v. to the Ninth Circuit Court of Appeals.

During the tendency of the appeal, this Court decided the case of *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). In *Payne*, this Court resolved a split among the circuits, and held that proof of price discrimination was not, in and of itself, sufficient proof of injury to support a

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Footnote 1 (con't)

App. 52a. The citation "App. _____" refers to the Appendix in the Petition for Writ of Certiorari, and the citation "R. App. _____" refers to the Appendix to this brief. Trial transcript passages are cited as "Tr. ____," and trial exhibits are cited as "Ex. _____"

verdict under Section 4 of the Clayton Act, 15 U.S.C. § 15. Texaco argued in the court of appeals that *Payne* was dispositive of the appeal. Plaintiffs argued that *Payne* was not dispositive; that this case is significantly different from *Payne*; that when this case was tried the *Fowler* rule had been specifically approved by the Ninth Circuit and by other circuits as well, and had been justifiably relied upon by the plaintiffs and the district court in instructing the jury on the appropriate measure of damages; and that if the adequacy of the damages evidence was now subject to question in view of the *Payne* decision, the Court of Appeals should remand for a new trial. The court of appeals, in a unanimous opinion, reversed the judgment n.o.v. for Texaco and remanded for a new trial.

Implicit in Texaco's argument here and in the court of appeals, and implicit in the district court's decision, is the notion that plaintiffs' evidence was insufficient to establish injury as required by the antitrust laws and that judgment for Texaco was therefore appropriate. The district court even went so far as to declare (incorrectly) that plaintiffs had acknowledged that they could not prove injury absent resort to the *Fowler* rule. In fact, plaintiffs made a strong showing of fact of injury and causal link to the violation.

Indeed, early in the trial Texaco *objected* to plaintiffs' presenting evidence to prove fact of damage, arguing that if plaintiffs were going to rely on *Fowler* they should not be allowed to present any evidence of the fact of damage other than evidence of the price discrimination. In response, plaintiffs' counsel explained that plaintiffs were not simply relying on *Fowler* to prove fact of damage:

> Your Honor, we are required in this case — I should not say required; Ms. Cohen [counsel for Texaco] may be right, we may not be required. However, *we are proving the fact of damage which is an entirely different item of proof than the amount.* By proving the fact of damage, we show that the rule adopted by the Ninth Circuit also has a basis in fact . . . but *we are entitled to prove the fact of damage in the manner in which we have*, and our claim under the measure of damages is actually the minimum amount possible that could be requested.

> Assuming that on every gallon of gas they brought they were charged an unlawful price, the consequences of that are much greater than just the one gallon of gas they brought. Perhaps it affects the rest of their business because they have to work harder to pay for it. The minimum amount they have lost was the amount that they were overcharged.
>
> *We are now proving to the jury that there was actual damage. . . . [W]e are entitled to prove the fact of damage.*

(Tr. 708-709, emphasis added.) Other comments showed the same thing.[2]

There was substantial and dramatic evidence of injury to the plaintiffs caused by the price discrimination. The evidence showed that the price discrimination was substantial in size, and that it occurred over a long period of time in a market characterized by vigorous competition and low profit margins. The evidence also clearly showed that the favored buyers used their lower wholesale prices to reduce the retail prices at which they sold gasoline to the public, and that the favored buyers' retail prices often were barely above the plaintiffs' wholesale buying price. There was

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2. In the course of the same argument the following exchange occurred between the district court and plaintiffs' counsel:

> THE COURT: Well *as I understand it, the only purpose for this is to show that there has been some damage and not for showing the measure of damage*?
>
> MR. WHALEY: *That's correct.*
>
> THE COURT: *Any damages for that basis you would agree should not be allowed by the Court or by the jury, but only measure damages that you have claimed. Your only showing is to show there have been some damages?*
>
> MR. WHALEY: *Your Honor, we're going to ask the jury to measure the damages that have been inflicted by the use of the Fowler v. Gorlick Construction* . . . we can tell the jury we don't want any more than that. If they want more than that, it would be speculative. But in considering that the award to damages [sic] they consider the fact they have been damaged.

(Tr. 713, emphasis added.)

> THE COURT: That's what I'm getting at. *You are getting into that [evidence of injury to plaintiffs' businesses] to show that there has been damage, but you are not contending and do not intend to*

substantial testimony that plaintiff lost customers to the favored buyers' stations, or were seen in other stations, and testimony that credit card slips from the favored buyers' stations were observed in customers' automobiles. The evidence also showed that the sales of Dompier and Gull (the favored buyers) increased dramatically, while the sales volume of independent Texaco retailers such as plaintiffs, who were not receiving a price discount, declined; that Dompier's share of total Texaco brand sales rose significantly while the share of other Texaco retailers declined; that Dompier and Gull were able consistently to increase the number of their stations while the number of independent Texaco stations (including the plaintiffs' stations) declined; that numerous witnesses familiar with the market, including Dompier's president and Texaco's assistant district manager, had observed that a competitor with a lower buying price necessarily had a competitive advantage; that small price differences caused substantial volume shifts; that Texaco's own personnel admitted that a distributor who operates as a retailer is not performing the traditional role of a distributor; that retailers paying the same price as plaintiffs had, in Texaco's own words, a "very real problem in competing against distributors who turned to retailing, using their lower price for that purpose; that Texaco realized this situation had caused "rampant and alarming" increases in distributor sales, a great portion of which was at the expense of independent retailers; that, in the words of Texaco's own sales vice president, the distributor price discount was the "root cause" of the decline in independent retailers' sales volumes; that Texaco's Spokane sales representative concluded that the plaintiffs "cannot compete" with

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Footnote 2 (con't)

> *contend that the jury is entitled to calculate damages based on that information, other than the minimum of what you call the minimum damage?*
>
> MR. WHALEY: *That's correct.*

(Tr. 715, emphasis added.)

Dompier; that Texaco's Spokane management termed Texaco's dual pricing system a "two headed snake;" that plaintiffs constantly complained to Texaco about lower prices received by customers of Dompier when Dompier did resell at wholesale rather than retail; and that Texaco personnel knew that Dompier was passing on a substantial part of his wholesale discount.[3]

Despite this evidence of injury and causation, the district court weighed the evidence of fact of damage and causation, and accepted Texaco's arguments that injury "may have been" caused by other factors (App. 29a); that there is a "real possibility" that other factors caused injury to plaintiffs (*Id.*); that other factors "might have" caused plaintiffs' injury (App. 46a, 47a); and that other factors "could have" affected plaintiffs adversely (App. 47a, 50a). The district court even went so far as to suggest that plaintiffs had admitted that they could not and did not prove any actual injury. (App. 40a.)

The court of appeals, however, examined the record and concluded that "[t]he record does not support the contention that appellants admitted inability to prove damages under any rule but *Fowler*." (App. 4a.) The court of appeals further held that this case was not distinguishable from *Fowler*, and that *Fowler* had not necessarily been overruled *sub silentio* by this Court's ruling in *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). (*Id.*) The court of appeals held that if *Fowler* was valid and not properly distinguishable at the time of ruling on the Texaco motion for judgment n.o.v., it should have been applied, and that judgment n.o.v. for Texaco was inappropriate. The court of appeals thus remanded the case for a new trial, a resolution which, it noted, paralleled the solution adopted by the Seventh Circuit in another post-*Payne* case, *Vanco Beverages, Inc. v. Falls City City Indus., Inc.*, 654 F.2d 1224 (7th Cir. 1981). (App. 4a-5a.)

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3. Excerpts from the plaintiffs' brief in the court of appeals, setting forth these and other facts, are contained in the Appendix hereto.

SUMMARY OF ARGUMENT

By its petition, Texaco seeks review by this Court of an issue which was only very recently addressed in *Payne*. Texaco points to no decision of this Court with which the decision of the court of appeals is in conflict. The issues raised by Texaco's petition simply go to the appropriateness of the Ninth Circuit's disposition of the case following argument. The Ninth Circuit's disposition of the appeal was identical to that followed by the Seventh Circuit in *Vanco Beverages*.

This case presents different, and much stronger facts than those before the Court in *Payne*. Here there was strong evidence of a violation of the Robinson-Patman Act, and substantial evidence of injury caused by the antitrust violation. Neither was present in *Payne*. The court of appeals correctly held that the district court should have ordered a new trial, rather than judgment n.o.v. for Texaco, based on its post-trial conclusion that it had erred in instructing the jury under *Fowler*.

ARGUMENT

The Evidence of Fact of Damage and Causation Was Sufficient to Support the Verdict.

The price discrimination here was of long standing duration, occurred in a competitive market, and influenced retail prices. There was evidence that the favored purchasers prospered while the disfavored purchasers did not, and that Texaco's own executives acknowledged the advantage which the price discounts offered and the adverse effects on the disfavored purchasers. These are circumstances which establish injury and permit the recovery of damages.[4]

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4. Only ten years before the trial of this case, this Court had indicated the sufficiency of such evidence. In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), the Court said:

> If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury. [Citations omitted.] Here . . . there was substantial evidence from which the jury could infer causation. There was evidence that Signal received a lower price from Standard than did

A violation of the antitrust laws need not be the only cause of injury. It is sufficient that it was a material contributing factor:

> It is enough that the illegality is shown to be a material cause of the injuries; a plaintiff need not exhaust all possible sources of injury in fulfilling his burden of proving compencible injury under § 4 [of the Clayton Act]

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969). Contrary to this fundamental rule, Texaco argued in the court of appeals that plaintiffs were required to introduce evidence to rebut the possibility that factors other than Texaco's violation caused injury to the plaintiffs. The district court adopted a similar theory in granting judgment for Texaco. In so holding, the district court improperly weighed the evidence, a practice which is not appropriate in ruling on a motion for judgment notwithstanding the verdict. Rule 50(b), Fed. R. Civ. P. The district court simply accepted Texaco's arguments — rejected by the jury — that the plaintiffs' injury "might have been" caused by other factors. But what "might have been found" plainly is not the standard on a motion for a judgment notwithstanding the verdict. *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977). Texaco argued what "might have been" to the jury at length, and the district court gave the jury instructions which directly tracked Texaco's arguments, and which virtually invited the jury to conclude that injury resulted from factors other than Texaco's long-standing price discrimination. (Tr. 4272.) The jury rejected those arguments. What the jury "might have" or "could have" concluded is not sufficient to

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Footnote 4 (con't)

> Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was evidence that Perkins repeatedly complained to standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. *This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act.*

395 U.S. at 648-49 (emphasis added). All these elements outlined by the Supreme Court in *Perkins* were present here.

reason to reason to overturn their verdict. The standard is far stricter than that. "If there is sufficient evidence in the record to support an influence of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). The district court improperly interfered with the jury's function.

Here there was substantial evidence of proof of injury, sufficient to support the verdict. Further, the court of appeals found that "the record does not support the contention that [plaintiffs] admitted an inability to prove damages under any rule but Fowler." The fundamental premise of the district court's memorandum decision, and Texaco's argument here, is wrong.

The Court of Appeals Properly Ordered a New Trial

Texaco argues that it was obvious that *Fowler* was no longer good law after this Court decided *Brunswick*. Yet the record discloses, and the court of appeals concluded, exactly the opposite.

Texaco argued the *Brunswick* theory to the district court several times before and during the trial. *On each occasion*, the district court concluded, contrary to Texaco's "obvious" argument, that *Fowler* was valid law which had to be followed. Plaintiffs relied upon these rulings of the district court and upon *Fowler* in presenting their damages evidence at trial. It was not until seven months *after* the verdict that the district court changed its mind and, for the first time, held that *Fowler* was no longer valid.

The Ninth Circuit correctly concluded that *Brunswick* did not necessarily overrule *Fowler sub silentio*. *Brunswick* involved damages claimed to have resulted from the presence of *additional* competition in the market — plainly not the kind of injury for which the antitrust laws intended a remedy. This case, on the other hand, involves exactly the kind of secondary-line price discrimination at which the Robinson-Patman Act was aimed. The *Brunswick* opinion nowhere mentions the Robinson-Patman Act, and does not indicate that the *Fowler* rule was jeopardized. Indeed, the Ninth

circuit's rule — a rule adopted by other circuits as well — was based upon an express statement of this Court that a private plaintiff could sue under the Robinson-Patman Act and recover three times the amount of the discrimination "without proving more than the illegality of the prices." In *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), this Court said that:

> We have assumed for the purposes of this case that petitioner could establish that the prices respondent charged were discriminatory so that they violated the Act. But if petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by the same evidence. *For despite petitioners' plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged in the absence of extraordinary circumstances, at least in the amount of that discrimination.*

330 U.S. 757 (emphasis added). *Brunswick* nowhere mentioned or even indicated that this prior statement of the Court was in jeopardy.

Given this record, plaintiffs and the district court were justified, as the Ninth Circuit held, in relying upon *Fowler* as valid law at the time the case was tried. Except where a prior decision is "papably erroneous", the principle of stare decisis should be adhered to in order to give stability and predictability to the law, *Pachmeyer Gun Works, Inc. v. Olin Matheson Chem. Corp.*, 502 F.2d 802, 805-06 (9th Cir. 1974), even if the earlier decision represents a minority rule which has been strongly criticized. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). The court of appeals correctly held that district courts are bound by the law of their own circuit and are not to resolve splits between circuits no matter how egregiously in error they feel their own circuit to be, and may not grant

judgments n.o.v. based upon their dissatisfaction with the law of their circuit.[5]

The thrust of Texaco's argument is that it was entitled to a judgment in its favor notwithstanding the verdict because of an error in jury instructions. But the appropriate remedy — adopted by the court of appeals — in such a situation is to order a new trial. *Puget Sound Nav. Co. v. Nelson*, 59 F.2d 697 (9th Cir. 1932). A judgment n.o.v. should be granted only if, as a matter of law, there was a total failure or lack of proof on any essential element of a party's case. *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958). The court of appeals' decision to remand for a new trial is consistent with these principles and with the decision of the Seventh Circuit in another post-*Payne* case where, as here, damages had been measured under the *Fowler* rule. *See Vanco Beverages, Inc. v. Falls City Indus., Inc.*, 654 F.2d 1224, 1231 (7th Cir. 1981).

Payne Is Not Dispositive

In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), this Court held that injury within the meaning of Section 4 of the Clayton Act may not be proven merely by proof of an unlawful price discrimination. To that extent, the Court's opinion clearly overturned the *Fowler* rule. The Court in *Payne* did not decide, however, whether the amount of the price discrimination could properly be the measure of damages in such a case. The Court noted, however, that the plaintiff in *Payne* had made an extremely weak showing of injury, and that it would be a close question whether, in that circumstance, the evidence would be sufficient to support a jury award under relaxed damages rule applicable in antitrust cases.

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5. *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964); *Bates v. Dickinson*, 226 F. Supp. 983 (N.D. Calif. 1964); *Todd Seattle Dry Docks v. O'Leary*, 87 F. Supp. 907 (W.D. Wash. 1949).

This case is far removed from *Payne* in the strength of the showing of injury. The plaintiff in *Payne* did not even present evidence showing that the plaintiff's competitors had in fact passed on their lower price to their customers, which the Court suggested may be the *sine qua non* of antitrust injury. 68 L. Ed. 2d 449, 449 n.6. Here, on the other hand, there is abundant evidence that the favored buyers passed on the price discount to their customers. Further, in *Payne* the record was not even sufficient for the Court to determine whether there had been a sufficient showing of a violation. 68 L. Ed. 2d 451-52. The Court therefore remanded to the court of appeals for a determination of liability, which was viewed as a prerequisite to the application of liberalized rules for proof of damages in situations where a wrongdoer's conduct has made damages difficult to measure. Here even the district court held there was sufficient evidence to prove that Texaco had consistently violated the Act. *Payne* does not require review of the court of appeals' disposition of this case.[6]

The Pending Writ of Certiorari In *Vanco Beverages* Is Irrevelant

Texaco argues that the Court should accept its petition because the Court has accepted a petition for a writ of certiorari in *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 654 F.2d 1224 (7th Cir. 1981), *cert. granted*, 102 S. Ct. 1610 (March 1, 1982) (No. 81-1271). Texaco suggests that the Court is going to review, in the *Vanco Beverage* case, the issue of

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6. On remand, the court of appeals found that Payne's evidence was legally insufficient to support a finding of unlawful price discrimination. The court found that the average difference in bonus payments over the relevant period had amounted to only $11.00 on the price of a new automobile. The court held that this was not the evidence of substantial price differences in a highly competitive market with low profit margins required by this Court's holding in *FTC v. Morton Salt Co.*, 334 U.S. 337 (1948). *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, _____ F.2d _____, 1982-1 CCH Trade Cases ¶ 64, 615, at p. 73, 376-377 (5th Cir. 1982). Here, as noted, the district court held that plaintiffs' proof of liability was sufficient to support the verdict. Moreover, there is abundant evidence in this record that the price discrimination was very substantial and caused injury to the plaintiffs.

adequate proof of competitive injury for purposes of a private Robinson-Patman action, and that "this case should be held pending resolution of that case."

Texaco misstates the issue presented by the *Vanco Beverage* case. In that case the evidence allegedly showed that the plaintiff had lost sales because the defendant was a dying regional brewer which had lost sales in all of its markets. The question for review, as phrased by the petitioner, is:

> 2. Whether the Court of Appeals erred in applying the competitive injury test of *FTC v. Morton Salt Co.*, 334 U.S. 337 (1948), where there was no evidence either of seller predation or of systematic preference to large buyers, and where the evidence showed that the plaintiff lost sales because the defendant supplier was a dying regional brewer that lost sales in all of its markets?

This case presents nothing like the same issue. Here there was clear evidence of a systematic preference to large buyers. Further, the other elements outlined by this Court in its *Morton Salt* opinion, are clearly present. The record undeniably shows a long standing, systematic practice of substantial price discrimination, which was used by the favored buyers against the plaintiffs, in an industry characterized by vigorous competition and low profit margins. The pendency of the *Vanco Beverage* petition provides no reason for further review of this case.

CONCLUSION

For the reasons stated herein, it is respectively submitted that Texaco's petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. WHALEY

Of Counsel:
LUCINDA S. EYMANN

APPENDIX

EXCERPTS FROM PLAINTIFFS' BRIEF IN COURT OF APPEALS

B. GENERAL FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

Texaco charged the plaintiffs a "retailer tankwagon" ("RTW) price for their gasoline (Tr., pp. 232, 669, 943, 1075, 1193-94, 1301, 1361, 1480, 1608). It gave Dompier and Gull substantial discounts off the RTW price (Tr., pp. 232, 362-67, 3848-49; Exhibits 463, 464, 79, 378-82) because they bought under "distributor" contracts. (Exhibits 80-83, 71, 79.)

But despite their "distributor" label, Dompier and Gull functioned as retailers, operating retail stations which sold gasoline to the public in the same market as the plaintiffs (Tr., pp. 332-563), but at much lower prices. (Tr., pp. 558, 3867.)[4/] At times Dompier did function

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[4/] See also Tr., pp. 175-77, 180-81, 250, 612-13, 695, 957-58, 963-66, 1097-98, 1204-06, 1213-14, 1311, 1494, 1376, 1612-13, 1737, 2199-200, 2241-42, 2375.

as a wholesaler, but when it did it usually passed along most or all of its discount to the retail stations it supplied, selling to them at prices well below the prices the plaintiffs paid. (Tr., pp. 446, 452-56, 459-61; Exhibits 729, 800, 791.)

Texaco gave Dompier, a "branded" distributor, a discount of 3.65¢-3.95¢ per gallon prior to 1977, and 2.65¢ thereafter.)Tr., pp. 363-68; Exhibits 80-83, 791.) Texaco also paid Dompier a "hauling allowance" which ranged from a low of .446¢ to a high of .809¢ per gallon and which compensated Dompier for the cost of picking up gasoline at the pipeline terminal and delivering it to its stations. (Exhibit 463.) Aside from this delivery function, for which it was compensated, when operating retail stations Dompier performed no functions which the plaintiffs

did not also perform. (Tr., pp. 531-36, 538-39, 554, 1156-60, 3871, 2300.)[5/]

In the early 1970's, and with increasing frequency thereafter, some Texaco wholesalers such as Dompier began to abandon the wholesale function and to operate retail stations, utilizing their price discounts and hauling allowances to post lower retail prices. (Tr., pp. 2297-2321; Exhibit 202, p. 36.)

Dompier began to concentrate most of its sales in high volume retail outlets in the early 1970's. Initially it sold to these outlets at sizeable discounts, but before long it took them over and operated the stations itself. (Tr., pp. 405-460; Exhibits 557, 26.) Retailing became 80%

[5/] The court instructed the jury that they could consider the hauling allowance in determining whether Texaco's discount to Dompier was an unlawful price discrimination or a functional discount as Texaco contended. (Tr., p. 4265.)

of its business. (Tr., p. 466.) By the end of 1978, Dompier was operating six Texaco retail stations, and supplied two others which were owned through a related corporation, Red Carpet Service, Inc., which had the same address as Dompier and common officers and directors.[6/] (Tr., pp. 349-58, 1881-87.) All the Dompier stations were "Texaco" stations. They sold the same product, displayed the Texaco sign and colors, and honored the Texaco credit card. (Tr., pp. 468-69, 554, 1884, 2445.)

Gull, an "unbranded" distributor, owned a chain of retail stations which marketed under the "Gull" brand. (Tr., p. 577.) Gull resold most of its gasoline

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[6/] Until 1973, John K. Dompier wholly owned John Dompier Oil Company and Red Carpet Service, Inc. Then John Dompier retired and his son Neil began purchasing his interest in Dompier Oil Company on a long-term contract. John Dompier and his wife Marjorie remained as officers and directors of both corporations. (Tr., pp. 349-58, 420-21, 1881-87, 1973.)

through "commission" stations (Tr., pp. 571-72),[7] but prior to 1975 Gull also sold to "consignment" or "open account" dealers who marketed under the "Gull" brand.[8] (Tr., p. 577.) Texaco's price discounts to Gull ranged from 4¢ to 6¢. (Exhibits 79, 378-82, 645, 648-56, 463-64.)

C. EVIDENCE OF DAMAGE CAUSALLY RELATED TO PRICE DISCRIMINATION.

The retail gasoline market in Spokane was characterized by strong competition and low profit margins. (Tr., pp. 563, 1207, 1213, 1218-19, 3603-07, 3862, 3867.) Except in the most unusual circumstances, a

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[7] The station operator received a commission for each gallon of gasoline sold through the station. (Tr., pp. 570-71, 598, 617.) Gull set the stations' retail prices, and title passed directly from Gull to the retail purchaser. (Tr., pp. 570-71, 598, 617.) By 1975, all Gull stations were commission stations. (Tr., pp. 571-72.).

[8] Exceptions were Gull's sales to Autotronics Corp., which operated a chain of low-priced stations under the name "Fill 'M Fast". (Tr., pp. 592-93.)

station's retail gasoline price was the most important factor to its success. (Tr., pp. 2303-04, 3824-26, 3836, 3861-62, 3864-66.) According to Texaco's own training manual, the amount of a station's nongasoline sales (such as sales of tires, batteries and accessories (TBA)) depended upon the size of its gasoline sales. (Tr., pp. 677-82; Exhibit 201.)[9/]

The plaintiffs' Texaco stations were, with one exception, all located in the central or northern part of the city,[10/] on or near major traffic arterials. The Dompier and Gull stations were for the most part located in the same central/north city

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[9/] See also Tr., pp. 183, 257, 1214-15, 1314, 1609, 1740-41, 2232-33.)

[10/] Appendix A. The only exception was the station of Clifford Robinson. His station was located on Interstate 90 on its western approach to the city.

area, on or near the same arterials.[11/] (Appendix A, B, C.) Because of Spokane's relatively small geographic size and the pattern of its streets, the city has substantial cross-city traffic and there was effective competition among stations over relatively broad areas. (Tr., pp. 609-613.) A vice-president of Gull testified that gasoline prices tended to move city-wide, attributing that fact to the high degree of mobility of Spokane motorists. (Tr., pp. 609-10.) This view was shared by the district sales manager for a chain of independent stations, who observed that price changes in one part of Spokane moved and affected other parts of the city,

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[11/] The locations of the various stations are identified on the map which appears in Appendix A. Their precise street addresses are set forth in Appendix B and the facts relating to the competition between the plaintiffs' stations and the Dompier and Gull stations are summarized in Appendix C.

and that price was extremely important to competition. (Tr., pp. 3600, 3603-07.)

Texaco made price changes on a city-wide basis, having abandoned in 1973 the practice of setting its prices on the basis of "zones" of competition within the city. (Tr., pp. 3835-37.) Moreover, even while they were used, Texaco's representatives believed that the price zones were too small (Tr., pp. 2393, 3831, 3846-48), a view shared by Gull (Tr., pp. 600-610), and Texaco included many of the plaintiffs' stations in or adjacent to zones in which Dompier and Gull stations were located. (Tr., pp. 542-47, 1058, 1062, 1068-69, 1096, 1370-71, 1741-42.)

Texaco encouraged Dompier to expand into this retail market. It had a "Fill the Gap" program under which distributors were "encouraged and motivated . . . to select and develop prime sites, thereby improving retail representation . . . ."

(Exhibit 11, p. 1.) Texaco's Wholesale Manager set an objective of three new distributor stations for the Spokane District under this program (Exhibit 12), and Texaco's Spokane representatives encouraged Dompier to purchase stations even if he had to pay more than their actual value to obtain them. (Tr., pp. 470-71, 1161-66, 1176-78, 1183-85, 1889-90.)

Dompier began by selling gasoline at substantial price discounts to low price, high volume Texaco stations.12/ Soon, however, it began to take over those stations, thereafter operating them

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12/In 1972 and 1973, Dompier sold at prices 2.65¢-3.4¢ below the RTW price to stations on Market Street, Third Avenue, Monroe Street, and Division & Cataldo, and to the two Red Carpet stations (one located on North Division Street, the other on Sprague Avenue, both principal traffic arteries). (Tr., pp. 444-62; Exhibits 791, 788, 789, 792, 800, 804.) Dompier continued selling at discounts below the RTW price until approximately January, 1974. (Id.; Tr., pp. 1837-39.)

directly. Dompier acquired a large Texaco station on Third Avenue, in the heart of Spokane, in mid-1974 (Tr., pp. 421-23), stations on Monroe Street and Freya Street, each a major north-south arterial, in 1975 (Tr., pp. 427-30), stations at Mission and Magnolia (at the intersection of two major arterials) and at Airway Heights in 1977 (Tr., pp. 433-36), and a station on Market Street, a major north-south arterial, in 1978. (Tr., pp. 430-31; Exhibits 800, 788, 789.) In addition, Dompier continued to supply the two Red Carpet stations.[13]/

The Gull stations, like Dompier's, were located on main traffic arterials, often very close to the plaintiffs' stations, and were exposed to the same customer traffic. (Appendix A, B, C.) Gull

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[13]/The Red Carpet stations were "car wash" stations which provided car washes to customers who purchased gasoline. (Tr., p. 964.)

operated eight stations in Spokane by 1975. (Exhibit 385.)

The Dompier stations generally posted retail prices 2-10¢ lower than the plaintiffs and 1¢ above the "independent" stations. (Tr., p. 558; see footnote 4, supra.) Often they charged retail prices which were at or near the wholesale price which the plaintiff had to pay Texaco. (Tr., pp. 1097-98, 1204-06, 1213-14, 1097-98, 1737, 2241; Exhibit 558.) A Gull executive characterized the Dompier stations as aggressive retail marketers which priced below their competitors in the immediate area and below prevailing major brand prices. (Tr., pp. 612-13.) Gull stations also priced much lower than the plaintiffs. (Tr., pp. 180-81, 957-58, 1376, 3867.)

Each plaintiff testified about how his station competed with the Dompier and Gull stations. (Appendix C.) Although it was

impossible to prove where former or potential customers of the plaintiffs bought their gasoline, several witnesses were able to identify specific custormers lost to Dompier and Gull because they observed the customers in the other stations (Tr., pp. 177, 178, 2242, 695-96, 702, 717; Appendix C) or because they saw credit card invoices from the Dompier or Gull stations in customers' automobiles when servicing them. (Tr., pp. 1741, 2242; Appendix C.)

The plaintiffs responded to the competition in a variety of ways. Some recognized that without the same buying price they could not post a low enough retail price to compete effectively on a price basis, and kept their retail prices high in an effort to earn the maximum profit on each gallon sold. (Appendix C.) Others converted their stations in whole or in part to self-service operations and matched the Dompier and Gull prices, but

lost money in doing so because of their higher buying price. (Id.) Others reduced their prices as much as possible, but not so far as to operate at a loss. These dealers found that their lower retail price was not low enough to substantially increase their gallonage. (Id.) Another plaintiff tried to offer hand car washes or car wash tickets to compete with a Dompier-owned Red Carpet car wash station one block away, but had insufficient profit margins to do so. (Tr., pp. 971-76.) All of the plaintiffs, recognizing they were unable to compete effectively on price, tried other means to compete. They worked extremely long hours, gave extremely good service, and invested in other inducements to attract customers (e.g., truck rental services, ice machines, etc.). (Appendix C.)

Texaco knew that dealers like the plaintiffs were in a disadvantageous

position. In a marketing department report discussing distributors who were retailing, Texaco concluded that independent retailers who converted to self-service but who paid the RTW price could be competitive only to a degree, and that retailers with a partial self-serve operation could not be sufficiently competitive to maintain sales in the long term. (Exhibit 202, p. 36.)

The results of this competitive situation were startling. Between 1970 and 1978, Dompier's sales increased by more than 5,000,000 gallons. (Tr., p. 3885.) Between 1970 and 1975, Dompier's monthly sales volume almost tripled (from 155,152 gallons to 462,956 gallons), whereas during the same period of time monthly "throughput" gallonage (gallonage sold to independent Texaco dealers such as the plaintiffs) fell from 569,269 gallons to 389,557. (Exhibit 215.) Whereas Dompier accounted for only 20.7% of the Spokane District

retail marketing volume in 1970 (155,152 gallons per month out of 749,786 gallons per month total), only four years later its share had grown to almost 50% (462,956 gallons per month out of 928,664 total gallons). (Exhibit 215, p.2.) During the same period of time, the share of the directly-supplied retailers like the plaintiffs declined from 76% to 42% (Exhibit 215, p.2), and the plaintiffs' sales either declined or showed little or no growth. (Exhibits 709, 712-721, 645, 648-657.) Eight Dompier stations were outselling 19 independent dealers. (Tr., p. 2178.) From 1975 to 1978, Dompier's annual sales increased an additional 1,200,000 gallons. (Tr., pp. 3881-85.) By 1978 seven of the thirteen plaintiff stations had closed. (Appendix C.)

Similar growth occurred with the Gull stations. Between 1973 and 1976, Gull's retail volume through its five major retail

outlets increased from 2,476,213 gallons to 4,629,620 gallons, or a growth rate of 87% over three years.[14/]

Numerous witnesses and exhibits supported the conclusion that these effects were causally related to the price discrimination favoring Dompier and Gull. Several witnesses, including the president of Dompier and Texaco's assistant district manager for the Spokane District, testified that a competitor with a lower buying price necessarily had a competitive advantage in the Spokane market over another competitor paying a higher price (Tr., pp. 563, 2386, 3862-63, 3867, 3869, 3606-07, 3825-26, 2303), and that price differences of one or two cents could cause substantial shifts in gallonage sold. (Tr., pp. 3603-04.) According to the area manager, a dealer

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14/ Exhibits 762, 763, 764, 767, 769. These are the years and stations for which complete Gull volume data was available.

paying a higher price than another was unable to match the retail price of the favored purchaser. (Tr., p. 3862.) The district manager for an independent chain of stations testified that a retail price difference of 2¢ would have a substantial effect on the amount of gasoline a station sold; that there is a definite relationship between a station's buying price and the retail price it can charge; and that a station with a lower buying price has more flexibility to post a competitive retail price. (Tr., pp. 3603-07.)

Texaco's own vice president in charge of marketing acknowledged that a distributor who operates as a retailer departs from his traditional role (Tr., pp. 2298-2300), and that by virtue of their discount distributor retail stations could charge substantially lower prices than independent

Texaco dealers (Tr., pp. 2303-04, 2327-31.) He testified, further, that this had caused "rampant and alarming" increases in distributor sales and dramatic shifts in volume away from independent retailers (Tr., pp. 2301-2321), and that "a great portion" of the independent retailers' loss could be explained by the magnitude of the distributor discount and the hauling allowance (Tr., pp. 2309-10). Most significantly, he testified that it was the judgment of Texaco management that the lower distributor price was the "root cause" of the problem:

> Q Was it then at that time the judgment of Texaco that the root cause of this problem was the distributor price?
>
> A Well, I wouldn't say the word "Texaco," of the sales, of the sales marketing, you know, management people, yes, that's what it came down to, right.

(Tr., p. 2321.)

In another internal document Texaco admitted that retailers who paid the RTW price had a "very real problem" in competing against distributor retailers. (Exhibit 202, p. 36.) It concluded that independent retailers who continued to post prices reflecting their traditional profit margins lost sales, but that if they went to partial or full self-serve operation they could only be competitive to a degree because of their higher buying price. (Id. at p. 36-37.)

Texaco drew the identical conclusion about the effects of its price discrimination in Spokane. A Texaco sales representative, asked to evaluate an effort by Dompier to obtain the Mission & Magnolia station, concluded that Dompier was being given a marketing advantage over independent retailers "with which they cannot compete":

> In addition, Dompier would achieve a net increase of one unit to nine accounts, eight of which are owned by the Distributor and operated on self-serve basis, pricing generally $.05 to $.10 below full service investment units in Spokane and with a technical cost/RTW spread of $.0365 per gallon. This would categorically allow our Distributor a retail marketing advantage over our present contract retailer and investment retailers with which they cannot compete.

(Exhibit 215, p. 3, emphasis added.)

Another Texaco sales representative who was assigned to the plaintiffs' stations testified that the plaintiffs were directly affected by the distributor stations and that their ability to compete with the distributor stations was a key to their marketing strategy. (Tr., pp. 2368-2375.) In fact, he testified that Texaco's Spokane management referred to Texaco's pricing in Spokane as a "two-headed snake" and that the Texaco management believed that Texaco would have to decide on one method or the other because

the two were in conflict. (Tr., pp. 2378-82.) The plaintiffs' sales representative also testified that the plaintiffs would have been unable profitably to operate their stations as low price, self-service stations while paying the RTW price. (Tr., pp. 2392-93.) Another Texaco sales representative acknowledged that there is a "direct relationship" between a dealer's buying price and the retail price he can charge, and another admitted to one of the plaintiffs that a distributor station was the direct cause of the plaintiff's marketing problems. (Tr., pp. 2250-53.)

D. PLAINTIFFS' PROOF OF DAMAGES.

Plaintiffs sought to recover the amount of the price discrimination on the gasoline they purchased. That is the measure of damages approved by this Court in Fowler Mfg. Co. v. Gorlick, 415 F. 2d 1248 (9th Cir. 1969), cert. denied, 396

U.S. 1012 (1970). The jury's verdict represents an average award of $10,891 per year for each plaintiff.[15/]

The damages sought were limited in scope. Plaintiffs sought damages only for gallons of gasoline actually purchased; they sought no damages for additional gallons they would have sold but which they lost; no damages for lost sales of TBA or mechanical services, and no damages for loss in going concern value of their businesses, or lost investment, although

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15/ The 12 plaintiffs had 13 stations which were operated for a total of 78 station years (number of stations X number of years stations operated). The verdict of $849,494, divided by 78 station years, results in an average award of $10,891 per year for each of plaintiffs' stations.

they were substantial. (Tr., pp. 2012-2038; Exhibits 526, 801.) Further, plaintiffs requested damages only during the time when an actionable discrimination existed. No damages were sought or awarded for the short periods of time when there was no discrimination. (Tr., pp. 3921, 2012-38, 4162; Exhibits 804, 800, 526.)

AFFIDAVIT OF SERVICE & FILING

Pursuant to Rule 28.2, Rules of the United States Supreme Court, the undersigned, a member of the Bar of the Court, states that Respondents' Brief in Opposition to Petition for Writ of Certiorari was deposited, properly addressed to the Clerk of the Court, in a United States post office or mail box, with first-class postage prepaid, on June 18, 1982; and that on said date copies of said brief were served on the following counsel for Petitioner as required by the Rules of this Court:

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The undersigned further states that counsel for Respondents received a copy of the Petition for Writ of Certiorari on May 20, 1982.

s/ William L. Dwyer

William L. Dwyer

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 18th day of June, 1982, before me, a Notary Public in and for the State of Washington, personally appeared William L. Dwyer, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 18th day of June, 1982.

s/ John S. Ebel

John S. Ebel
Notary Public in and for the State of Washington, residing at Seattle